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FEDERAL SECURITY INTERESTS:

June 2000

Prepared by Fraser Milner Casgrain

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PART ONE: INTRODUCTION[1]

Messrs. Fraser Milner Casgrain has been retained by the Law Commission of Canada to provide an overview of the current statutory and regulatory provisions regarding federal security interests. We understand that the Law Commission of Canada is considering the possibility of recommending to the Government of Canada that certain reforms be undertaken in this area.

Accordingly, this report has three main objectives. First, it identifies and describes the various federal statutory and regulatory provisions dealing with security interests. Second, it reviews the case for harmonizing the current federal security interest regime. Finally, it identifies some of the options available and notes certain advantages and disadvantages arising from each of the options.

In order to satisfy these objectives, the first step undertaken by Fraser Milner Casgrain was to

identify the various federal statutory and regulatory provisions dealing with security interests. These statutory and regulatory provisions were then summarized and classified into eleven broad categories. Where a provision could not be easily grouped into one of the categories, it was classified into an eleventh "miscellaneous" category. The summaries for each of these categories are included as appendices A to J of this report.

Once these provisions were summarized and categorized, a search of the case law and the academic literature was performed in order to identify the strengths and weaknesses of each of the provisions, as well as the potential options for reform. Lawyers at Fraser Milner Casgrain were also consulted in an attempt to identify certain practical problems associated with the various federal statutes and regulations dealing with security interests and their interplay with provincial *PPSA* legislation. Finally, certain recommendations were formulated based on the results of the aforementioned research and consultation.

As demonstrated by the table of contents, the report itself is organized in accordance with the eleven categories of provisions identified in the appendices. In addition, part three of the report provides some general conclusions and recommendations for reforming the federal security regime.

PART TWO: FEDERAL STATUTORY PROVISIONS DEALING WITH SECURITY INTERESTS

I. CLASSIFICATION

There is a wide range of federal statutory and regulatory provisions dealing with security interests. For analytical purposes, these provisions can be classified into three general categories:

Provisions related to the granting or taking of security interests by federally-regulated enterprises

This area encompasses security interests relating to Banks and other financial institutions, railways and rolling stocks and agricultural and agri-food enterprises.

Provisions related to the granting or taking of security interests on federally-regulated property

This area is composed of security interests relating to intellectual property, real and personal property owned by the federal Crown, real and personal property owned by Indians and non-consensual federal security interests.

Miscellaneous provisions

A number of federal statutes also address security interests relating to bankruptcy issues, pensions and benefits, and miscellaneous legislative issues.

It must be emphasized that the analysis provided below does not purport to examine every federal statute dealing with federal security interests. Indeed, it does not address security interests in the area of aeronautics, fisheries, mining (i.e. royalties), employment, maritime shipping, and oil and gas. More specifically, we will not examine the following statutory and regulatory provisions:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 4 and 4.4.

Air Canada Public Participation Act, R.S.1985, c. 35 (4th Supp.), ss. 8(1)(a).

Atlantic Fisheries Restructuring Act, R.S.C. 1985, c. A-14, ss. 4(1)(a) and 4(1)(b).

Canada Marine Act, 1998, c. 10, s. 31, 72, 80, 91, 116, 117, 119, 119 and 122..

Canada-Newfoundland Atlantic Accord Implementation Act, 1987, c. 3, s. 102-118.

Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, 1988, c. 28, s. 105-121.

Canada Petroleum Resources Act, R.S.C. 1985, c. 36 (2nd Supp.), s. 84-100.

Canada Shipping Act, R.S.C. 1985, c. S-9, s. 45-54, 148, 196, 394, 460, 461, 462, 468, 469, 472, 521, 572, 581, 584, 597, 598, 600, 602, 603, 614, 629, 672, 673, 677, 682, 684, 685, 711, 716, 720, Articles 20, 21 and 22 of Chapter IV in Schedule V and Article 8 of Chapter II, Article 13 of Chapter III and Article 15 of Chapter IV in Schedule VI. (see also amendments not in force in 1998, c. 16). (see also amendments not in force in 1998, c. 16).

Civil Air Navigation Services Commercialization Act, 1996, c. 20, s. 56(1) and 56(3).

Coasting Trade Act, S.C. 1992, c. 31, s.16.

Federal Court Act, R.S.C. 1985, c. F-7, s. 22(2)(c).

Historic Canal Regulations, SOR/93-220, s. 49-51.

Marine Insurance Act, S.C. 1993, c. 22, ss. 15 and 49.

National Energy Board Act, R.S.C. 1985, c. N-7, s. 111 and 114.

Petroleum and Gas Revenue Tax Act, R.S.C. 1985, c. P-12, s. 31.

II. BANKS AND OTHER FINANCIAL INSTITUTIONS

A. Introduction

There is a wide range of federal legislative provisions dealing with the granting of security interests by federally regulated financial institutions. Given the variety and breadth of these provisions, it is impossible to examine all of them in this report. Instead, the purpose of this section is to identify certain provisions which have been characterized as problematic. These provisions can be divided into three categories: (1) provisions authorizing the taking or granting of security interests by specific financial institutions (or categories of financial institution); (2) provisions that purport to create loan guarantee or loan insurance regimes; and (3) the *Bank Act* provisions. Some of the issues and problems arising out of each of these categories are examined below. A summary of these provisions is provided in Appendix A.

B. Provisions authorizing the taking or granting of security interests

The federal legislative provisions authorizing the taking or granting of security interests generally relate to two types of federal financial institutions: federally-*owned* financial institutions (i.e. crown corporations) and federally-*regulated* financial institutions (e.g. cooperative credit associations).

The first category includes the following legislative provisions: *Business Development Bank of Canada Act*, 1995, c. 28, s. 15(1); *Canada Deposit Insurance Corporation Act*, R.S.C. 1985, c.

C-3, s. 10(1); *Canada Mortgage and Housing Corporation Act*, R.S.C. 1985, c. C-7, s. 27-28; *Canadian Payments Association Act*, R.S.C. 1985, c. C-21, s. 17; and *Export Development Act*, R.S.C. 1985, c. E-20, s. 10(1.1)(d) and 10(6). The second category includes the following: *Cooperative Credit Associations Act*, 1991, c. 48, s. 383, 395, 475, etc.; *Insurance Companies Act*, 1991, c. 47, s. 470, 500, 542.07 and 559; and *Trust and Loan Companies Act*, 1991, c. 45, s. 419 and 458.

Given that the above-mentioned provisions are relatively straightforward they have generated very little litigation. Indeed, the limited cases that have examined these provisions were concerned with their interaction with section 136 of the BIA. For example, in *Goodwyn* v. *Federal Business Development*, the Federal Business Development Bank ("FBDB", the predecessor to the Business Development Bank of Canada) appealed a trustee's disallowance of its claim filed in bankruptcy.[2] The FBDB argued that it was an agent of the Crown and, therefore, it enjoyed a preference under section 136(1)(j) of the *Bankruptcy and Insolvency Act* (then 107(1)(j) of the *Bankruptcy Act*), which grants a priority to claims of the Crown in Right of Canada. The current version of this provision (which is substantially similar to the provision examined in Goodwyn) reads as follows:

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payments as follows:

(...)

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province , rateably notwithstanding any statutory preference to the contrary.

It should be noted that paragraph 136(1)(j) has been repealed for all practical purposes and applies only to bankruptcies that occurred before November 30, 1992[3].

To support its submission, the FBDB invoked subsection 42(1) of the *Federal Business Development Act* (the predecessor to subsection 3(4) of the *Business Development Bank of Canada Act*) which stated that the FBDB is "...for all purposes an agent of the Crown". For its part, the trustee submitted that while ss. 42(1) designated the FBDB as an agent of the Crown, other portions of the Act had the effect of compromising such status. The trustee further submitted that, in any event, the preference under section 136(1)(j) was restricted to the Crown, not its agents including the FBDB.

The Supreme Court of Ontario (sitting in bankruptcy) rejected the trustee's arguments. According to Master Ferron, the provisions of the *Federal Business Development Act* designated the FBDB a Crown agent and therefore it enjoyed a preference under the *Bankruptcy Act*. It should be noted that the same submissions were considered in *re Forte* (1984) 46 O.R. (2d) 199 (Ont. S.C.), which resulted in the same decision.[4]

These cases have significant implications for federally owned financial institutions, as they suggest that any federally-owned Crown agent financial institution benefits from the preference contained in section 136(1)(j). Said Crown agent financial institutions include the Business Development Bank of Canada (see subsection 3(4) of the *Business Development Bank of Canada Act*), the Canada Deposit Insurance Corporation (see subsection 3(2) of the *Canada Deposit Insurance Corporation Act*), the Canada Mortgage and Housing Corporation (see subsection 5(1) of the *Canada Mortgage and Housing Corporation Act*), and the Export Development Corporation (see section 18 of the Export Development Corporation Act). It excludes, however, the Canadian Payments Association (see subsection 3(2) of the *Canadian Payments Association Act* which specifies it is not an agent of the Crown).

C. Provisions that purport to create loan guarantee or loan insurance regimes

The federal provisions relating to loan guarantees and loan insurance have recently been the subject of much controversy. In particular, the loan guarantee and insurance programs outlined in the *Canada Student Loans Act* and *Canada Small Business Financing Act*[5] respectively have been criticized as inadequate by various commentators. Some of these criticisms are examined below.

1. *Canada Student Loans Act*

With respect to the student loan program, it is important to note that student loans are generally extended at a time when the recipient has no income or assets and would therefore not qualify for conventional loan financing. The student loans enable the recipient student to obtain a post-secondary education which, presumably, will enable such recipient to improve his income capability. Student loans are expected to be repaid out of the student's post schooling income, with the repaid funds then being loaned to new students.[6]

As might be expected, the default rate among students is extremely high. Under section 7 of the *Canada Student Loans Act* , the loss sustained by the chartered banks (which are currently responsible for the day-to-day administration of the program pursuant to an agreement negotiated with the federal government in 1995) as a result of a student's default may be recovered from the federal government provided that certain conditions are satisfied.[7] Section 29 of the Regulations states that where the federal government compensates a lender under section 7 of the Act, the lender shall take steps to collect due payments of principal and interest and realize on any security on behalf of the government.[8]

In 1992, Crown claims generally lost their preferred status in bankruptcies. As a result, student loans are now unsecured claims in bankruptcies, having no preference over other unsecured liabilities of a bankrupt. However, even though student loans are merely an unsecured debt, the courts have shown an increasing reluctance to grant an absolute discharge in cases where student loans form a significant amount of a bankrupt's indebtedness. At the same time, the courts have also made it clear that the existence of student loans is only one factor to be considered in a discharge hearing. Other important factors include the bankrupt's employment status, prospects and income and on occasion the bankrupt's age and health.[9]

The discharge orders granted by the courts have varied widely from province to province.[10] Discharge orders made in British Columbia, for example, on average require payments to be made for three years in length and permit bankrupts to immediately obtain discharges upon consenting to judgment in the stipulated amount. Discharge orders issues in the Maritime Provinces and Alberta generally require payments for five to six years but also permit discharges with a consent to judgment. In contrast, Saskatchewan discharge orders appear to impose the longest repayment term, generally six to eight years and, in one instance, a fifteen-year term. Furthermore, Saskatchewan courts do not allow the bankrupts to consent to judgment until they have established good payment records and consequently such bankrupts remain in limbo for extraordinary periods of time.

In addition to these regional inconsistencies, the administration of the federal student loan program is currently under significant financial pressures as a consequence of an increasing default rate among student loan recipients. In order to be compensated for this credit risk, the participating Canadian chartered banks (Bank of Nova Scotia, Royal Bank of Canada and Canadian Imperial Bank of Commerce) recently sought to renegotiate their student loan agreement with the federal government. According to media reports[11], the federal government offered to increase the annual payment from $50-75 million (depending on the bank) to $155 million annually to the banks to compensate them for this enhanced credit risk. This amount was rejected as insufficient by the banks.

As a result of the government's failure to reach a satisfactory agreement with the banks, the Department of Human Resources Development ("DHRD"), which is responsible for the Canada student loans program under the *Canada Student Loans Act*, announced in March 2000 that it would reassume responsibility of the program beginning on August 1, 2000 (i.e. the expiry date of the current five-year agreement with the three participating banks). According to bank executives, this situation will cost the federal government approximately $250 million annually.[12] We understand that as of the date of this report, DHRD is in the process of calling an *expansion* of interest from foreign financial institutions.

2. *Canada Small Business Financing Act*

The Canada Small Business Financing Act (CSBFA) was enacted in December, 1998 to replace the small business loans program introduced in 1961 under the Small Business Loans Act (SBLA).[13] Its primary objective is to increase the availability of financing for the purpose of the establishment, expansion, modernization and improvement of small businesses. Under section 5 of the CSBFA the Minister is obligated to indemnify a qualifying lender for a specified percentage of the resulting loss sustained under a defaulting loan, provided that the

requirements of the CSBFA and the Regulations have been met. The Regulations outline the specific procedures and conditions in the granting and administering of Canada Small Business Financing loans and in the submission and substantiation of claims for loss for loans made after March 31, 1999.[14]

Pursuant to section 8 of the Regulations, lenders are expected to extend loans under the CSBFA as if such loans are being extended in the ordinary course of business. Specifically, section 8 specifies that before making a loan, a lender contemplate certain credit risk due diligence. In addition, section 14 requires the lender to "...take valid and enforceable first-ranking security in the assets of the small business whose purchase or improvement is to be financed by the loan".

Similar to the Canada Student Loan Program, the CSBFA/SBLA program has been the subject of much criticism in recent years as a consequence of the increasing default rate among CSBFA/SBLA loan recipients. Indeed, Industry Canada's annual report in March, 2000, noted that the total value of the claims paid out to banks under section 5 of the CSBFA/SBLA have increased from approximately $32 million in 1993-1994 to $221 million in 1998-1999.[15] Meanwhile, the aggregate amount of the loans extended under the CSBFA/SBLA decreased from $2.5 billion in 1993-1994 to $1.6 billion in 1998-1999.

According to said annual report, this increase in the program's default rate was the result of less stringent lending criteria between 1993 and 1995 (i.e. prior to the adoption of the CSBFA), and an increase in the average value of loans. However, it is important to note that while the average value of the loans made under the program has gone from $58,794 in 1993-1994 to $71,549 in 1998-1999, the total number of loans made during this period decreased from 43, 351 to 22,278.[16]

In addition, the CSBFA/SBLA program has also been subject to an increasing criminality rate. During the last three years, the RCMP has reportedly investigated 70 cases of alleged fraud where, for instance, loan recipients tendered fraudulent invoices to document equipment acquisitions for purposes of qualifying for loans under the program. Section 8 of the Regulations (discussed above), which requires banks to exercise the same due diligence standard as undertaken under their conventional loans, was introduced largely in response to this phenomenon. Unfortunately, given the relatively small loan amounts made under the CSBFA (i.e. $71,549 in 1998-1999), the economics do not justify the costs associated with properly investigating the veracity of the information supplied by the applicable loan applicant.[17]

D. *Bank Act* security

1. Summary of section 427

The most important, and most controversial provision of the *Bank Act* relating with federal security interests is section 427. In short, subsection 427(1) permits a chartered bank to lend money to certain specified categories of borrowers on the security of certain specified types of collateral, provided the borrower delivers to the bank an assignment in a prescribed form. Under subsection 427(2), the delivery of the prescribed document gives a security in the property in question to the bank, whose rights and powers are equivalent to those of a warehouse receipt or bill of lading, or, depending on the type of property, a first and preferential lien and claim.

The actual assignment by the borrower is not registered. Instead, under section 427(4), a Notice of Intention is to be registered in the prescribed form, setting out the borrower's intention to give a section 427 security.[18] The Notice of Intention must be registered in the appropriate Bank of Canada office not more than three years prior to the execution and delivery of the assignment by which the security was given. The appropriate Bank of Canada office will be the one located in the province where the borrower has its place, or principal place, of business.

The Notice is to be signed by the borrower, but it does not identify the principal amount that is to be advanced or even the nature of the collateral. In fact, the mere registration of a Notice of Intention does not necessarily mean that a section 427 security has been or will be given by the borrower. No limit is placed on the number of assignments under section 427 that may be made by the borrower within three years after the registration of the Notice of Intention. If a

Notice of Intention is not registered, subsection 427(4) provides that the rights and powers of the bank in respect of the secured property are void as against creditors of the assignor and as against subsequent purchasers or mortgagees in good faith of the secured property.[19]

To release its security, the bank registers a certificate of release in the appropriate Bank of Canada office pursuant to paragraph 427(4)(b). This step permanently cancels the particular Notice of Intention; it cannot be used to "lift" the security temporarily. In re Weiss Air Sales Ltd.,[20] a bank registered a certificate of release in order to facilitate a proposed sale of inventory by the debtor. After the proposed sale fell through, the bank sought to reinstate its security with a new Notice of Intention. No new assignment was made and no further funds were advanced. The Court held that the cancellation of the original Notice of Intention by the bank released its section 427 security. Thus, upon a later default the bank could not enforce its security by seizing the debtor's assets because it was then only an unsecured creditor. According to the Court, "[w]hile under other systems, steps can be taken to temporarily 'lift' liens, charges or encumbrances, or to rearrange priorities, there is no such mechanism in the *Bank Act*".[21]

2. Analysis

The *Bank Act* provisions dealing with security interests have been the subject of much academic literature.[22] The purpose of this section, however, is not to duplicate these analyses, but rather to provide a non-extensive overview of some of the problems and issues that have been identified.

In general terms, legal commentators and practitioners have identified the following difficulties with the Bank Act's regime[23]:

Undue emphasis on title and ownership rights

Section 427 uses a title-oriented approach to determine the validity of security interests. For instance, paragraphs 427(2)(a) and (b) state that in order for a bank to be entitled to the rights and powers of a section 427 security, the person giving the security must be the "owner" of the collateral at the time of delivery of the security document or become the owner of the collateral at any time thereafter before the release of the security by the bank. As a result, it would appear that a bank is precluded from acquiring valid security unless the debtor is the "owner" of the collateral at the time of the creation of the section 427-security interest. By contrast, subsection 2(a) of the Ontario Personal Property Security Act states that "this Act applies to (...) every transaction without regard to (...) who has title to the collateral that in substance creates a security interest". (This being said, it should be noted that the title-oriented nature of Bank Act securities has been somewhat eroded by court decisions such as *Royal Bank of Canada v. Sparrow Electric Corp.*, infra).

Uncertainty in relation to the order of priorities between section 428(1) and PPSA security interests

In *Rogerson Lumber Co.* v. *Four Seasons Chalet Ltd.*,[24] the Ontario Court of Appeal held that section 428(1) of the Bank Act does not override a retention of title under a conditional sale agreement governed by the Ontario *Personal Property Security Act* ("PPSA") regardless of whether the purchase money security interest was perfected under the PPSA. The Court also held that the first to file rule in the PPSA does not apply to a section 427 interest. There are, however, contrary Saskatchewan decisions.[25] Accordingly, there remains some uncertainty in relation to the order of priority between section 428(1) and PPSA security interests.

Anachronistic nature of section 427

Some legal commentators have argued that the present *Bank Act* security does not reflect the modern commercial reality that certain classes of secured creditors should be given special status. Each province that has enacted personal property legislation has recognized, for example, that a purchase money creditor (i.e. an unpaid vendor or financier of specific purchased property) should be entitled to a security interest in the goods sold or financed which, subject to compliance with certain procedural requirements, will have priority over all other security interests given by the same debtor. In addition to potentially providing inadequate protection to certain creditors, this lack of recognition in the *Bank Act* of the special status of certain classes of creditors impacts adversely on borrowers trying to obtain

specific financing from a bank which is not its main banker.

Lack of detail

The Bank Act's shortcoming in this regard relate to four factors:

(a) In most modern day transactions, banks need to take security in more than just inventory and book debts generated from the sale of such inventory. Generally speaking, apart from certain limited classes of equipment, the *Bank Act* prohibits this practice and consequently the banks are compelled to acquire security under the applicable provincial system.

(b) A *Bank Act* security can only be taken from certain kinds of borrowers. While the list of eligible borrowers have grown over the decades, there is no explanation as to why any class of borrower remains excluded. The practical result of such exclusion is that the banks will take security under the applicable provincial system. Similarly, s. 427 securities are only available to one kind of lender, i.e. banks. It is questionable whether an assignment of Bank Act security to a lender that is not a bank is operative, particularly as to revolving advances subsequent to the assignment.

(c) *Bank Act* security can only be taken as security for actual present and future loans and not for any other kind of obligation. It is therefore not possible, for example, to take *Bank Act* security for obligations under a guarantee or for any kind of past obligation. This is another reason for banks having to resort to security under the applicable provincial system.

(d) It has been held that only legal entities can give *Bank Act* security.[26] This means that other forms of business entities such as general partnerships, limited partnerships, unincorporated associations, organizations, syndicates, joint ventures, trusts and trade unions are effectively prohibited from granting *Bank Act* security. In all such cases, banks again have to rely upon provincial security regimes.

Double registration and double documentation

One of the techniques adopted by banks for maximum protection is to obtain, where possible, a security interest under the relevant provincial legislation as well as section 427 security. The effect of such double documentation has not yet been considered in Ontario but appears to have been accepted in Saskatchewan.[27] For their part, legal commentators remain divided over the legal effect of such double documentation.[28] In particular, there is much uncertainty about whether it is possible for a secured party to hold successive security interests in the same collateral governed by two incompatible chattel security regimes and, if it is possible, whether the bank must elect one security interest over another and, if so, at what point.[29]

III. RAILWAYS AND ROLLING STOCKS

A. Statutory Provisions

There are two primary federal statutes which govern the taking of personal property security in railroads and rolling stock. These provisions are summarized in Appendix B.

The *Canada Transportation Act*[30] (the "CTA"), creates a scheme by which any mortgage, hypothec or assignment issued by a railway company may be deposited in the office of the Registrar General of Canada, and notice of the deposit is to be published in the Canada Gazette without delay.[31] Furthermore, section 105 of the CTA applies the same deposit and registry system for mortgages, hypothecs, assignments and other forms of security relating to rolling stock. Finally, section 106 of the CTA provides that insolvent railway companies may prepare and file a scheme of arrangement in the Federal Court, and grants the Federal Court power to restrain any action against the railway company that the Court considers appropriate. This section, however, still permits a creditor to take possession of rolling stock under a security agreement, bailment, mortgage or hypothec, under certain conditions.

The *CN Commercialization Act*[32] enables the Minister of Transport (with the approval of the Minister of Finance) to enter into an agreement or arrangement with CN, or any other

person, regarding the management of any debt, obligation incurred by, or security interest in CN. The Minister is further permitted to enter into an arrangement to dispose of or manage any of CN's shares, and to pay out of the Consolidated Revenue Fund any amounts relating to the management of CN's security interests.

B. The Current Security Registration Regime

Sections 104 to 106 of the CTA are the primary sections governing security interests in rolling stocks. These sections create one registry system, currently located in Ottawa under the supervision of the Minister of Industry and the Corporations Directorate. The centralized registry system created by these sections raises a number of issues regarding the taking of security interests in railways and rolling stock.

1. Validity, Priority and Enforcement of Security Interests

The CTA fails to mention any method by which the validity, enforcement or priority of the registered security interests may be maintained. Indeed, sections 104 and 105 of the CTA provide instructions for the registration and deposit of these security documents in the central registry. However, Industry Canada itself suggests that the validity of the deposit is not guaranteed. For example, Industry Canada's Policy Statement 16.1 states that:

"By accepting a deposit under section 104 or section 105 of the CTA, the Registrar does not provide any opinion on the substantive validity of such document. As a result, acceptance and registration by the Registrar of a document pursuant to section 104 [or 105] of the CTA does not ensure that it is a mortgage or hypothec [or that the instrument evidences a security document relating to rolling stock] for the purposes of the statute."[33]

Furthermore, the CTA provides no assurances regarding the priority of security instruments that are deposited in this registry. While section 104 of the CTA is silent as to third parties, section 105(3) provides that once the deposit is made, the document is "valid against all persons". While this statement appears to suggest the creation of a priority system, at least in relation to rolling stock, Industry Canada is notably silent on the subject. Policy Statement 16.1 maintains that the registry will not provide any position regarding the priority of the documents.[34]

This scheme of registration creates uncertainty regarding the need for creditors to also register their documents in provincial PPSA registration systems. Sections 104 and 105 of the CTA state that once a mortgage, hypothec, assignment or other document is deposited in the registry in accordance with the CTA, registration or filing "under any other law respecting real or personal property" is not required.[35] Notification, according to the steps outlined in the CTA, must also be completed before registration is deemed sufficient. Once again, Industry Canada is non-committal in its endorsement of this principle and states in Policy Statement 16.1 that it "appears" that provincial registration is unnecessary, but that "[f]iling exclusively at the federal level is entirely at the discretion of the user".[36]

Nevertheless, the uncertainty regarding registration and priorities still exists. For example, the CTA does not discuss whether an instrument registered solely in the federal registry will take precedence over an instrument that is registered *only* under provincial PPSA legislation, but *prior to* when the first instrument was registered at the federal level. Nor does the CTA discuss the possibility of whether registration at both the federal and provincial levels will ensure greater security for the creditor. Thus, there is the potential for registrations under the CTA and provincial PPSA legislation to conflict.

From a constitutional perspective, the Federal Government is given authority, under section 91 of the *Constitution Act*, to regulate railways and related security interests.[37] Indeed federal jurisdiction in this area may be classified as a matter that is not merely a "private or local nature". Furthermore, under section 92 of the *Constitution Act*, matters relating to railways are specifically excluded from provincial jurisdiction.

Case law itself may offer some guidance as to whether or not provincial personal property legislation can be read together with security legislation affecting railways.

In the case of *Zygocki et al. v. Hillwood*[38] Justice Van Camp reviewed a mortgage affecting

railway land. The mortgage had been imposed pursuant to section 77 of the Railway Act[39], a predecessor of today's CTA. At the time of the case, the mortgage was over 40 years old. The central issue was whether or not this mortgage still affected the railway land because the mortgage was in existence for longer than 40 years, and thus violated the provisions of the Registry Act.[40]

Justice Van Camp reviewed both the provincial and federal legislation and found that:

"...it is to be presumed that the Province did not intend to enact legislation in conflict with the statute of the Dominion Parliament within its undoubted jurisdiction...if there is conflict, the Dominion legislation prevails..."

and

"However, where the legislation has been dealing with different subject-matters, and where the legislation of the Province relates to companies generally and has been passed for purposes on which the Province has authority to legislate, the provincial legislation will apply to Dominion companies if it is not directed to interfering with status and preventing exercise of powers."[41]

The Court eventually decided that the 40-year mortgage should be removed from the railway lands as continuing the existence of the mortgage would only violate the principles under the Registry Act. Thus, the Court read both provincial and federal legislation as complementary.

Thus, Justice Van Camp's commentary suggests that the courts *may* be inclined to find that the CTA would prevail over the provincial PPSA legislation in that the CTA addresses subject matter exclusively within the jurisdiction of the federal government (although there is certainly no substantial authority for this). It appears, however, that the courts are more likely to rely on a conflict of laws examination on a "case-by-case approach" in order to determine the precedence of federal versus provincial legislation. Unfortunately, this process only adds to the uncertainty of the system.

Provincial real property legislation (such as the *Registry Act (Ontario)* and the *Land Titles Act (Ontario)*[42]) also contains provisions relating to security interests in railway property. For example, section 44(1) of the *Land Titles Act (Ontario)* (LTA) provides that all registered land is subject to the liabilities, rights and interests listed in this section including, among others, an interest deposited with the Receiver General of Canada pursuant to the *Railway Act*. Under this provision, if the previous owner of the land was a railway company, then the interest registered under the *Railway Act* would only bind the land if a note of the previous ownership of the land by the railway company has been entered onto the title. Similarly, section 113(5) of the *Registry Act (Ontario)* provides that the sections of the Act relating to a notice of claim do not apply to a corporation constructing a railway, nor do they apply to land used or owned for the purpose of operating a railway. Case law has not considered the relevant priority claims as between the CTA and these provincial real property provisions. Clearly, these provincial acts contemplate railway property as unique, although clarification of the effects of these acts on registration under the CTA would assist the railway personal property regime.

2. The Registration System

The registry system created by the CTA is itself an inadequate system. Indeed, it appears that section 104 intends only to provide notice to third parties of mortgages and hypothecs, rather than a system to register documents of title. However, section 105 of the CTA, which deals with documents relating to rolling stock, contemplates registrations relating to title instruments, such as documents evidencing sales and conditional sales. Nevertheless, the CTA refrains from guaranteeing information beyond mere notice to interested individuals. Policy Statement 16.1 specifically states that "the filing system does not provide an index or other features of a title system".[43]

In addition, the current registry is an awkward system for creditors to file and search for registrations. The registry is located in Ottawa and filings are made either by mail, fax or in person. Once the registry receives a deposited document, a confirmation and acknowledgement letter are mailed to the registrant approximately five days following the date of filing. Thus, registrants are not able to immediately confirm that their registrations are valid and effective. Indeed, it may take up to several months for searches to appear on the system.

This time delay requires an interested party to examine the "day-book" at Industry Canada in order to determine whether any recent security interests have been created. Furthermore, searches are difficult to perform on this outdated registry system. Although the documents are now scanned into a computer database system, interested parties are required to conduct their own searches, and no telephone or verbal confirmations are permitted.[44] As well, the records have not been amalgamated or linked to reflect the amalgamations of various railroad companies and various other transactions. Thus, a party is required to search under each possible name.[45] Interested parties are also required to make appointments in order to search the registry's database.

The final step for registration involves the registrant arranging for the publication of the deposited document in the Canada Gazette.[46] Although a necessary step, this additional obligation contributes time and delay to the process of registration. As well, the CTA does not address the question of priorities in this situation. For example, the legislation does not canvass the possibility of Party A registering an interest in the railway land or rolling stock under provincial PPSA legislation *after* a Party B has registered its interest under the CTA, but *before* the Party A has had a chance to publish its interest in the Canada Gazette. Finally, the practical value of publishing a notice in the Canada Gazette is questionable at best. A searching party may not have ready access to the Canada Gazette and this publication and a manual search through this publication is open to human error. Indeed, publication in the Canada Gazette would be unnecessary if an adequate registration system were to be established.

C. Intermodal Transportation and Railway Security

One important issue relating to railway security is that of intermodal transportation and the acquisition of security in rolling stock. For example, what is the status of security in rolling stock once that rolling stock is removed from the railway and transported by a truck to its final destination? This issue does not appear to be addressed either by legislation or by case law. Thus, it appears that in the absence of any security interest protection in this situation, secured creditors should register their interests under the various provincial PPSA registration schemes. The practical difficulties of effecting these registrations suggest that future amendments to the current scheme should address the priority conflicts between PPSA and the CTA in the context of rolling stock and intermodal transportation. The current scheme must change to accommodate changes in the transportation industry.

D. International Interests in Mobile Equipment

One initiative taken by the International Institute for the Unification of Private Law (UNIDROIT) may eventually affect the method by which creditors obtain security in railway rolling stock.

In December of 1997, a preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment was created. This draft Convention was submitted to the UNIDROIT Governing Council in February of 1998. The purpose of this future convention is to "provide for the constitution and effects of a new international interest in mobile equipment".[47] This convention would create an international register where security interests in mobile equipment (such as railway rolling stock, satellites, aircraft, etc.) would be registered. Of course, this initiative is still in the research stage and faces a number of challenges. Academics have raised a number of issues, including: the method by which domestic and international transactions should be distinguished; the type of equipment that should be covered under the convention; whether or not the registry should be "asset-based"; and the method under which local law would be preserved while still making the convention's benefits available to all.[48] If and when the convention is approved, Canada would likely become a signatory and incorporate the law into Canadian transportation practice.

E. Conclusion

The registration regime established by the CTA for railways and rolling stock would benefit from further clarification of priorities as between provincial and federal registrations, as well as more defined commentary on the validity and effects of registration. As well, a more easily accessible and comprehensive search system would only add to the effectiveness of the overall scheme.

IV. AGRICULTURAL AND AGRI-FOOD ENTERPRISES

Agriculture has always been considered a vitally important sector of the Canadian economy. Concern for the well being of farmers is sparked by the common belief that the security of a nation is enhanced when it is able to feed itself. Agriculture is also a sector that employs a great number of people. Finally, the traditional role of agriculture in Canada has made the family farm an integral part of the fabric of Canadian society.

Because of these historical, psychological and economic factors, the federal government has historically taken an active role in passing legislation to help farmers. The need for such help is influenced in part by the susceptibility of agriculture to downturns caused by steep fluctuations in world commodity prices, as well as by the threat posed to family farms by large scale "agri-business" operations. Part of the federal government's effort to help farmers is aimed at assisting them in their dealings with creditors. The *Farm Debt Mediation Act* (the "*FDMA*") and its predecessor, the *Farm Debt Review Act* (the "*FDRA*"), in particular is designed to give farmers experiencing financial difficulties some extra time in which to negotiate a settlement with their creditors and to put mediation procedures in place to assist in this respect. The ultimate purpose of the *FDMA* is to keep farmers on the farm.[49] Secured creditors should be aware of this legislation, as it has a significant impact on their ability to enforce their security in situations where the *FDMA* applies. The relevant legislative and regulatory provisions are summarized in Appendix C.

A. The *Farm Debt Mediation Act*

The *FDMA* was passed to ensure that farmers faced with insolvency would have the opportunity to resolve their financial difficulties with the cooperation of their creditors and the assistance of an unbiased panel.

1. Constitutional Authority

The Act is essentially legislation affecting property and civil rights in the province. In order to make the *FDMA* constitutionally palatable, the federal government must justify it under its bankruptcy and insolvency head of power. Thus, the provisions of the Act are only available to insolvent farmers. The predecessor to the *FDMA*, the *FDRA*, was available to all farmers "facing financial difficulty".[50] In limiting the application of the *FDMA* to insolvent farmers, the federal government has made it less susceptible to any potential constitutional challenge.

2. Applications by Insolvent Farmers

Section 5 of the *FDMA* provides as follows:

5.(1) Subject to section 6, a farmer may apply to an administrator for either

(a) a stay of proceedings against the farmer by all the farmer's creditors, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or

(b) a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement.

It is noteworthy that while the stay applies to all the farmer's creditors, only secured creditors are allowed to participate in the mediation. It is also worth noting that "farmer" is defined as "any individual, corporation, cooperative, partnership or other association of persons that is engaged in farming for commercial purposes". Thus the *FDMA* applies to both large corporate agri-businesses and family farms.

3. Stay of Proceedings

As mediation under the *FDMA* is not compulsory, the legislation's greatest impact on secured creditors is made by the stay of proceedings. Section 7(1) of the *FDMA* provides that upon

receipt of an application by an insolvent farmer the administrator shall issue a thirty-day stay of proceedings against the farmer by all the farmer's creditors. The stay of proceedings prohibits creditors from enforcing "any remedy against the property of the farmer" or from commencing or continuing "any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of the farmer".[51]

(a) "Proceedings"

Case law respecting the nature of "proceedings" affected by the *FDMA* confirms that the net cast by the stay of proceedings is extremely broad. In the case of *Royal Bank of Canada v. Wagner*[52], which examined an identical provision contained in the predecessor to the *FDMA*, the *FDRA*, the Saskatchewan Court of Appeal held that service of a notice of intention pursuant to s. 21 of the *Limitation of Civil Rights Act* is the taking of an "action" to realize on security.[53]

A similar stay of proceedings to that provided for in the *FDMA* is found in section 11 of the *Companies' Creditors Arrangement Act* (the "*CCAA*"). Case law interpreting s. 11 of the *CCAA* has held that payment of a letter of credit drawn on account of an insolvent company comes within the meaning of proceedings.[54] Other "actions" that have been held to be subject to the s. 11 stay of proceedings include the realization by a bank on its s. 178 *Bank Act* security, exercising a contractual right of set-off and a landlord attempting to terminate a lease based on the insolvency of the lessee.[55]

(b) Extension of the Stay of Proceedings

Section 13 of the *FDMA* gives the administrator the authority to extend the stay of proceedings for a maximum of three further periods of thirty days each where the administrator considers an extension "essential to the formulation of an arrangement between a farmer and the farmer's creditors". The Regulations to the *FDMA* offer more guidance in this regard, providing that an extension will be given only if (a) the value of the farmer's assets will not significantly diminish during the period of the extension, (b) the majority of the farmer's creditors will not be unduly prejudiced by the extension and (c) there is no indication of bad faith by the farmer. [56] A decision by the administrator not to extend the stay is subject to appeal. The stay is extended until the outcome of the appeal is determined.

(c) Preservation of Collateral

The prospect of a 120-day stay of proceedings will cause concern among creditors with respect to preservation of the collateral. This concern is addressed in s. 16(1) of the *FDMA*, which provides that where a stay of proceedings is issued a guardian is to be appointed to watch over the farmer's assets. Often the farmers themselves are appointed guardians of their assets. If a nominee of a creditor is appointed guardian, the nominee's expenses must be borne by the creditor.[57] Only secured creditors are allowed to put forward nominations for guardians.

Additional relief for creditors concerned that assets may be dissipated is contained in s. 14(2) of the *FDMA*, which gives the administrator discretion to end the stay where the administrator is of the opinion that the farmer has, by any act or omission, jeopardized his or her assets or obstructed the guardian in the performance of the guardian's duties. The combined effect of the Regulation noted above and ss. 14 and 16 of the *FDMA* is to provide secured creditors with some degree of certainty that the value of the collateral will not diminish even if the maximum 120-day stay of proceedings is granted.

4. Financial Review and Mediation

Another major part of the *FDMA* is the review of the farmer's financial situation and the mediation between farmers and their creditors. Section 9 of the *FDMA* directs the administrator to undertake a detailed review of the farmer's financial affairs. For this purpose, the *FDMA* allows the administrator to appoint an expert. The results of the review are put into a report, at which point the administrator appoints a mediator.

The *FDMA* provides that only secured creditors are entitled to participate in the mediation. Participation in the mediation is entirely voluntary and the administrator has the discretion to

terminate the mediation where the farmer or the majority of secured creditors refuse to participate or refuse to participate in good faith. Otherwise, the mediation ends either when an agreement is reached or upon the termination of the stay of proceedings.

5. Notice Requirement

Section 21 of the *FDMA* requires secured creditors who intend to enforce their security to provide the farmer written notice of their intent to do so. In the notice the secured creditor must inform the farmer of the right to make an application under s. 5 of the *FDMA*. It is notable that the notice requirement applies only to secured creditors. In a case dealing with the old *FDRA*, it was held that the notice provision does not apply to execution creditors.[58] The result is that the *FDMA* does not prevent an unsecured creditor from taking action against a farmer subsequent to the issuance of a notice by a secured creditor but prior to the filing of an application.[59] This apparent oversight exposes secured creditors to a risk that the asset pool will be reduced before they can realize on their security.

Section 22 of the *FDMA* underlines the importance for secured creditors of adhering to the notice requirement. Pursuant to s. 22, "any act done by a creditor in contravention of s. 21 is null and void, and a farmer affected by such an act may seek appropriate remedies against the creditor in a court of competent jurisdiction".

The *FDMA* is something that all lenders lending money to agricultural enterprises should be aware of. Failure to abide by its provisions can lead to sanctions against lenders. The primary result of the *FDMA* for secured creditors is that they may be forestalled from enforcing their security for up to 120 days. However, this result should not be exaggerated. Provisions are in place to ensure that the stay of proceedings will not be a lengthy one if the farmer is hopelessly insolvent or if a majority of the secured creditors do not wish to mediate. On the other hand, the *FDMA* represents an opportunity for secured creditors to sit down with the insolvent farmer, armed with a report prepared at government expense detailing the farmer's financial situation, and assisted by a mediator also paid for by the government. Looked at in this light, the *FDMA* represents not just a burden on secured creditors, but also an opportunity for secured creditors and farmers alike to reach a mutually beneficial solution.

B. Other Federal Legislation

In its efforts to strengthen the agricultural sector, the federal government has passed a number of laws designed to facilitate the lending process between banks and farmers. These include the *Agricultural Marketing Programs Act*, the *Farm Credit Corporation Act*, and the *Farm Improvement Loans Act*. These laws place the federal government in the role of either guarantor or lender with respect to loans to farmers. In some cases, the legislation gives the federal government the authority to impact on the taking and enforcement of security by non-government lenders.

1. The *Agricultural Marketing Programs Act*

The *Agricultural Marketing Programs Act* (the "*AMPA*") is designed to improve marketing opportunities for producers of crops by guaranteeing the repayment of advances made to them as a means of improving cash flow at or after harvest.[60] The *AMPA* creates a system whereby under certain conditions the Minister guarantees the repayment of loans advanced by lenders and "administrators" to producers of crops. "Administrator" is defined to mean either the Canadian Wheat Board or (a) an organization of producers that is involved in marketing a crop or (b) any other organization that the Minister considers is supported by producers and designates as an administrator.[61]

Of particular interest to secured creditors is s. 12 of the *AMPA*, which provides that "an administrator that makes a guaranteed advance to a producer has a security interest in the crop for which the advance was made, and in any crop subsequently grown by the producer, for the amount of the producer's liability..." The predecessor to the *AMPA*, the *Advance Payment for Crops Act*[62] gave the producer organization advancing the money a lien on the crop. The position of the administrator under the *AMPA* is better, as the lien given by the *Advance Payment for Crops Act* would rank as an unsecured claim in a bankruptcy. Section 12 does not apply to lenders advancing money. Presumably it is expected that these will enter into their own security agreement with the borrower.

The most significant aspect of s. 12 of the *AMPA* is its application to crops "subsequently grown" by the producer. The fact that the administrator's security interest applies to "subsequently grown" crops represents a real advantage over other lenders, particularly those who take security in crops in the ordinary manner i.e. not pursuant to the *AMPA*. Section 12(2)(a) of the Ontario *PPSA* restricts the ability of a security interest to attach to crops under an after-acquired property clause.[63] It prevents the security agreement from attaching to crops which become growing crops more than one year after the security agreement is entered into. A security interest in subsequently grown crops will attach only if the security interest comes within s. 32(1) of the Ontario *PPSA*, which provides:

32.(1) A perfected security interest in crops or their proceeds, given not more than six months before the crops become growing crops by planting or otherwise, to enable the debtor to produce the crops during the production season, has priority over an earlier perfected security interest in the same collateral to the extent that the earlier interest secures obligations that were due more than six months before the crops become growing crops by planting or otherwise even thought the person giving the value has notice of the earlier security interest.

Advances made pursuant to the *AMPA* are likely to come within s. 32, as they are generally made to enable the debtor to produce crops during a specific production season. Ordinary secured creditors taking security in crops should be aware of s. 12 of the *AMPA* and ss. 12 and 32 of the Ontario *PPSA*, as they ensure that secured creditors taking security in crops in respect of loans advanced to enable the debtor to produce crops during the production season will have priority.

2. The *Farm Credit Corporation Act*

The *Farm Credit Corporation Act* (the "*FCCA*") is designed to improve the availability of credit for farming operations and other rural businesses related to farming.[64] The Corporation established by the *FCCA* is empowered to, among other things, provide loans to farmers and acquire and hold security interests in respect of loans made or guarantees given. The *FCCA* does not in any way effect the system of priorities and registration that normally defines relations between secured creditors and debtors. It simply introduces another lender into the field.

3. The *Farm Improvement and Marketing Cooperatives Loans Act*

The *Farm Improvement and Marketing Cooperatives Loans Act* (the "*FIMCLA*") is described in its preamble as "An Act to increase the availability of loans for the purpose of the improvement and development of farms and the processing, distribution or marketing of farm products by cooperative associations".[65] Section 4 of the *FIMCLA* provides that the Minister is liable to pay to a lender[66] ninety-five per cent of any loss it sustains as a result of a loan made to a farmer for, among other things, the purchase of tools, livestock and additional land. Section 4(3)(c) provides that in order to be subject to the *FIMCLA* the principal amount of the loan must not exceed $250,000. The *FIMCLA* reduces considerably the risks normally associated with lending to farmers. It does not alter the normal system of registration and priorities associated with secured lending.

C. Conclusion

The federal government intervenes in a number of ways to ensure that agricultural lending is not subject to the ordinary rules of commercial lending. For the most part this intervention is of benefit to lenders and other secured creditors, and thereby to farmers as it facilitates access to credit. The government establishes a mechanism for negotiating with farmers faced with insolvency, advances money to farmers where an ordinary lender might be reluctant to do so and guarantees loans made by lenders to farmers. Lenders should be aware of these benefits provided by the federal agricultural statutes. They should also be aware of the potential of these statutes to create delay in the enforcement of security, and even to effect priorities where the collateral consists of crops.

V. INTELLECTUAL PROPERTY

A. Introduction

In the age of e-commerce and the revolution in information technology, the value of intellectual property ("IP") to companies is tremendous. IP represents for many companies their primary asset. The intangible nature of IP raises new problems for lenders, who have traditionally taken a "bricks and mortar" approach to advancing money to businesses. Taking security in IP represents a new and increasingly important challenge for lenders.

Unfortunately, the current legislative system for taking a security interest in IP leaves much to be desired. The lack of clarity in the legislation does not provide lenders with the kind of assurance they are looking for. This in turn is likely to create an obstacle to the growth and prosperity of both IP-based businesses and the lending institutions themselves. Comprehensive and clear legislative reform making it easier for lending institutions to advance funds against IP assets would provide a welcome boost to one of the fastest-growing sectors of the Canadian economy. A summary of the relevant legislative and regulatory provisions is provided in Appendix E.

B. OVERVIEW OF THE CURRENT SYSTEM

1. The Federal IP Legislation

For the most part, the federal IP statutes do not concern themselves with the regulation of security interests in IP. There are, however, provisions in the various statutes which touch upon security interests by allowing the registration of "assignments" and "transfers".

(a) The *Copyright Act*

Section 57 of the *Copyright Act* provides for the registration of an assignment of copyright:

57. (1) The Registrar of Copyrights shall register an assignment of copyright, or a licence granting an interest in a copyright...

(3) Any assignment of copyright, or any licence granting an interest in a copyright, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice, unless the prior assignment or licence is registered in the manner prescribed by this Act before the registering of the instrument under which the subsequent assignee or licensee claims.

The effect of s. 57 on security interests is unclear. "Assignment" is not defined in the Act, and it is therefore unclear whether the language is broad enough to include a security agreement or other document granting a security interest in IP.[67] Assuming that s. 57(3) does apply to security interests, it is not clear what effect the section might have on priorities issues. Would a subsequent assignee without actual notice under the *Copyright Act* have priority over an earlier *PPSA* registration? The wording of the *Copyright Act* would seem to dictate such a result, but this would undermine the basic "first to register" priority scheme adopted by the *PPSA*.

The possible impact of s. 57 of the *Copyright Act* on the issue of priorities was discussed by the Federal Court, Trial Division in *Poolman v. Eiffel Productions S.A.* ("*Poolman*").[68] The Court in *Poolman* dealt with the differing priority schemes established by s. 57(3) of the *Copyright Act* and Article 1488 of the Civil Code of Lower Canada. The Court held that the issue of priority was to be determined in accordance with the provisions of existing provincial law. The decision in *Poolman* indicates that in determining issues of priority among competing assignments the courts will defer to provincial *PPSA* legislation.[69] This approach is certainly the most logical, given that the *Copyright Act* was not designed to provide a complete system for determining priorities.

The inadequacy of the *Copyright Act* as an arbiter among competing assignees is further illustrated by the difficulties involved in searching the register. The presence of a security interest in a copyright does not show up on the card under the name of the work in the index of works. A potential lender searching the registry would have to verify the microfiche registry for the registration certificate of the work to see if it is followed by the registration certificate of a security agreement. In a situation where the author grants a security interest in a work whose title has changed, it is not possible to verify the ownership of rights in the work. There is also no mechanism for notifying secured creditors of subsequent transfers of rights related to

the item of IP encumbered.[70]

(b) The *Trade-Marks Act*

Section 48(3) of the *Trade-marks Act* provides that the Register of Trade-marks "shall register the transfer of any registered trade-mark". The term "transfer" is not defined, and it is not clear whether a transfer would include the registration of a security interest. The Trade-Marks Registrar does administratively accept and record documents which grant a security interest in trade-marks, though it has no express statutory authority for doing so.[71]

Section 10 of the *Trade-marks Act* states that "Where any mark has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade-mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken therefor". Section 10 potentially creates a problem for those holding security in a trade-mark that has achieved a high level of distinctiveness. Upon default of the debtor, the secured creditor must be careful to ensure that the quality and nature of the goods with which the trade-mark is associated is not altered. If the quality and nature of the goods does change, a concerted effort must be made to notify the public of this change. This problem was addressed in *Heintzman v. 751056 Ontario Ltd.* ("*Heintzman*").[72] In *Heintzman*, a company purchased a maker of pianos that had been producing high-quality pianos in Hanover, Ontario since 1926. The purchaser closed the Hanover operation and began to sell lower quality pianos made in the United States and Korea in association with the Heintzman name. The change in quality of the pianos was not advertised to the public, and the Court ordered that the Heintzman trade-mark be expunged. *Heintzman* illustrates that lenders taking security in IP should be aware of some of the unique attributes of IP, where ownership does not always allow the owner to treat the asset as it pleases.

(c) The *Patent Act*

Section 50 of the *Patent Act* (a) states that patents are assignable and (b) states that assignments of patents shall be registered in the Patent Office. Section 50 makes the *Patent Act* the only federal IP statute that *requires* registration of assignments or transfers. Section 51 of the *Patent Act* provides that any assignment of a patent is void against any subsequent assignee unless the assignment is registered.

Sections 50 and 51 of the *Patent Act* create uncertainty in regards to their application to security interests and their interplay with the *PPSA* in determining priorities. These issues were addressed by the Alberta Court of Appeal in the case of *Colpitts v. Sherwood* ("*Colpitts*").[73] *Colpitts* dealt with a priority dispute between a subsequent assignee of a patent with actual notice of an earlier unregistered assignment. The Court treated an assignment intended as security as an assignment registrable under the *Patent Act*. The Court held that the subsequent assignee with notice did not take priority over the earlier unregistered assignee. It is significant that in *Colpitts* all of the parties involved were aware of the respective agreements. The Court was not faced with a situation where an assignee became aware of a subsequent assignment only after registering. In other words, the *Colpitts* decision made sense given the facts of the case, but the finding should not be treated as a principle with general application.[74]

There is nothing in the wording of the *Patent Act* to suggest knowledge or lack thereof should play any role in determining priority among assignees. The finding that the taking of a security interest in a patent constitutes an assignment registrable under the *Patent Act* is also suspect. American courts, in interpreting language similar to that found in the *Patent Act*, have held that as taking security in a patent falls short of being a complete assignment, security interests in patents do not have to be registered as assignments under the *Patent Act*. A UCC registration will be sufficient to perfect a lender's security interest in a patent. The U.S. courts determined that where the federal legislation does not expressly provide for the taking of a security interest, the UCC will fill in the gaps. The logic behind this determination is that if Congress intended to create an all-inclusive federal security regime for patents, it would have expressly provided for such in the legislation.[75] While it is far from certain that this logic would prevail in Canada, it does make some sense. The *Patent Act* as currently drafted is not designed to provide a searchable registry and a method for determining priorities. To bestow the *Patent Act* any role in these matters simply creates confusion among creditors and

undermines the *PPSA*. However, as there is no authoritative Canadian case law interpreting ss. 50-51 of the *Patent Act*, a prudent secured creditor will register a security interest in a patent under both the *PPSA* and the *Patent Act*.

The federal registries were never intended to establish a regime governing security interests. The federal statutes fall far short of establishing a comprehensive scheme whereby the priorities of secured parties in IP may be resolved. Indeed, the presence of the registration sections in the federal IP statutes serves largely to add to the uncertainty and confusion facing lenders who take security in IP.

2. The Provincial *PPSA* Legislation

Security agreements involving IP are almost invariably registered under the *PPSA*. This is hardly surprising, seeing as the federal system offers no real alternative. The *PPSA* offers a complete system governing issues involving registration, attachment and priorities. There are, however, a number of problems with the *PPSA* as it relates to IP.

There are several characteristics unique to IP that make it difficult for security interests in IP to fit easily into the *PPSA* structure. For example, in order for a security interest to attach, the debtor must sign a security agreement containing a description of the collateral sufficient to enable it to be identified. This requirement raises a problem where the collateral consists of unregistered trade marks and copyrights, trade secrets, unpatented inventions etc.[76]

As discussed above in relation to the *Heintzman* case, lenders taking security in trade marks should be aware of the need to maintain the trade mark's distinctiveness. This requirement distinguishes trade marks from more traditional collateral in which the full bundle of rights associated with ownership can be taken.

Copyrights present a similar dilemma, as a secured creditor enforcing its security in respect to a copyright will not obtain all the perquisites of ownership. Section 14(1) of the *Copyright Act* provides that the author of the work has the right to the integrity of the work and the right to be associated with the work as its author. These "moral rights" may not be assigned but may be waived in whole or in part. In order to ensure that it will have the most complete set of rights possible, a lender taking security over a copyright will have to seek from the author of the work a waiver of moral rights.

Section 12 of the *PPSA* provides that a security interest in intangible property will automatically attach to after-acquired property as long as the security agreement between the parties evidences an intention to this effect. Section 12 raises some unique issues where the collateral is IP. Important IP assets such as research and development and companion technology do not easily fit into traditional concepts of after-acquired property. To ensure successful capture of such after-acquired intellectual property assets, they should be clearly described in the security agreement.[77]

This list of characteristics unique to IP is far from complete, but it does give an indication of why a system for registering security interests designed specifically for IP might be recommended.

C. Interplay Between Federal and Provincial Legislation

The existence of possibilities to register security interests in IP at both the federal and provincial level creates a number of problems. If the federal IP statutes are interpreted as governing priorities between competing security interests as well as assignments, it would create a potential for conflict between the federal and provincial statutes. It would also put the impetus on lenders to search the federal registries for prior registered security interests, a task which, as discussed above, is markedly more difficult than performing a *PPSA* search. For the most part, these problems have not been litigated. It is thus unclear how the conflicts between the federal and provincial statutes might be resolved. The *Colpitts* and *Poolman* cases do little more than provide fodder for speculation as to how a court might approach issues involving security interests and the interplay between the *PPSA* and the federal IP statutes. There is no clear answer as to (a) whether security interests are included by the reference to "assignments" in s. 50 of the *Patent Act* and s. 57 of the *Copyright Act* and to "transfers" in s. 48 of the *Trade-marks Act* and (b) whether the *PPSA* or the federal IP statutes govern priority among competing assignees and transferees. The presence of these unresolved issues and potential

conflicts adds to the uncertainty involved in lending on IP, which in turn is likely to have a negative effect on a key sector of the economy.

D. A Single Federal Registry for Security Interests in IP

One possible solution to the problems outlined above is the creation of a single federal registry for security interests in IP. This would involve amending the federal IP statutes to deal more comprehensively with priorities issues. It would also involve the creation of an easily searchable registry. The creation of a single federal registry would end the confusion as to the necessity and significance of registering security interests at both the provincial and federal levels. It would end the current duplication where lenders register their security interests under both the *PPSA* and the relevant federal IP statute. Finally, creating a single federal registry for security interests in IP run by CIPO makes it more likely that a *sui generis* security interest that takes into account some of the unique attributes of IP could be created. Arguably, the experts at CIPO are in a better position to tailor a security interest to suit the needs of IP clients than are those who administer the *PPSA*.

E. Repealing the Federal Registration Provisions

As an alternative to the creation of a single federal registry, the registration provisions contained in the federal IP statutes could be repealed. Another option would be to amend the provisions to make it explicitly clear that they have no application to security interests. Either of these options would be less complex than creating a whole new registry at the federal level. The impact on lenders would be minimal. They would continue to register their security interests under the *PPSA* and would be spared the need to register at the federal level. The federal registration provisions as currently drafted do little more than confuse lenders wishing to take security in IP. Their purpose and effect is unclear, making their repeal worth consideration should the ideal of a single federal register be rejected on the grounds that it would be too complicated or that it would not pass muster constitutionally.

F. Constitutional Issues

Any proposal for a single federal registry for registering security interests in IP will have to be constitutionally acceptable. The *Constitution Act* specifically gives the federal government jurisdiction over patents and copyrights. The federal government has based its right to legislate in the area of trade-marks on its trade and commerce power. The provinces, on the other hand, have legislated with respect to security interests pursuant to their jurisdiction over property and civil rights in the province. Trade secrets and trade names are also matters coming within provincial jurisdiction.

The federal government may enact legislation that impacts on an area of provincial jurisdiction as long as the "pith and substance" of the legislation is directed to a matter within its jurisdiction. Arguably, a federal registry for recording and determining priority among security interests in patents, trade-marks and copyrights falls within federal jurisdiction to legislate in these areas.[78] Its impact on the provincial power to legislate in the area of property and civil rights would be merely incidental. This argument does not hold true with respect to trade secrets and trade names. It is also not clear where such IP assets as research and development and companion technology would fit in. The federal government could try to include these "other" IP assets in a registry with reference to its trade and commerce power. Arguably, these assets are not located "within a province" and federal legislation impacting them could be justified under the interprovincial trade and commerce power.

In our federal system there are myriad examples of federal and provincial laws that overlap and impact on each other. The general approach to this situation has to be to interpret such laws in such a way as to allow them to coexist. A federal registry for the recording of security interests in all types of IP would certainly impact on matters within the jurisdiction of the provinces. However, this alone does not mean that the federal government would be unable to proceed. Indeed, it is exceedingly difficult to predict how the constitutional arguments might play out if litigated. Much would depend on the precise wording of the federal legislation and on the positions of the two levels of governments. This said, constitutional considerations will certainly be an important factor in any reform to the registration provisions in the federal IP statutes.

G. Conclusion

The current process for taking security in IP is marked by a lack of certainty and clarity. Reforming the law to deal with the issues outlined above would facilitate the growth of an increasingly vital sector of the Canadian economy.

VI. FEDERAL PROPERTY

There are a number of statutes that govern the ability of an individual or corporation to take security in federal property. Both creditors and debtors must be aware of this legislation in order to ensure that any transfer, assignment or dealings with federal property is effective and enforceable. A summary of the relevant legislative and regulatory provisions is provided in Appendix F.

A. The *Federal Real Property Act*

The *Federal Real Property Act* (FRPA)[79] governs the powers of the Federal Government in relation to federal real property. The FRPA defines "real property" as land either within or outside of Canada, including mines, minerals, and buildings, structures, improvements and fixtures on, above or below the surface of the land and any interest therein.

Section 16 of the FRPA grants the Governor in Council authority to deal with federal property. Thus, the Governor in Council is permitted to sell, lease, or dispose of any federal real property. As well, section 16(1)(k) permits the Governor in Council to accept, release or discharge any security, by way of mortgage or otherwise, in connection with any transaction authorized under the FRPA. Section 16(2)(h) also authorizes the creation of regulations dealing with the activities covered in section 16(1).

Federal real property possesses a unique status that must be fully understood in order to effectively deal with any security in the property.

Section 91(a) of the *Constitution Act, 1867*[80] authorizes Parliament to legislate exclusively in relation to "public debt and property". Thus, case law has confirmed that provincial laws, regulations and municipal by-laws which govern property use do not apply to federal real property.[81] While this authority has occasionally caused friction between the federal and provincial governments, the fact remains that the federal government is still authorized to deal with federal property, and may even legally construct buildings that violate provincial laws, municipal by-laws, and construction laws on these federal lands.[82]

The FRPA has created a comprehensive property regime, complete with extensive regulatory powers, to effectively handle all forms of transactions with federal real property. Section 16(1) in particular, serves two functions. First, it provides the Governor in Council with a broad range of powers that overlap and override the regulatory powers created under section 16(2). The authority created under section 16(1) enables the Governor in Council to handle transactions which may be particularly sensitive.[83] Second, section 16(1) grants the Governor in Council authority to handle transactions which may not be contained in section 16 (2).[84]

Parliament has not enacted any regulation with respect to section 16(2)(h), regarding the granting of mortgages or another type of security when the purchase price is not received at or before the closing of the transaction. Commentators have suggested that the power to approve these kinds of transactions is left with the Governor in Council because the Federal Government does not wish to "make a habit", so to speak, of lending money to purchasers of its property.[85]

The FRPA clearly establishes a structure to provide for the grant, transfer, license and lease of federal real property. In contrast, the legislation suggests that the Federal Government is less inclined to loan money to the purchasers of its property (and thereby take a mortgage to secure its interest). Indeed, the power to accept, discharge and release any mortgage or security interest where the total purchase price is not paid on or before closing, is not delegated under regulation. Instead, the Governor in Council is required to approve such transactions. While purchasers of federal property may find this approval requirement difficult to overcome, the policy rationale behind the requirement is obvious. In order to avoid the trouble of defaulting mortgagors, the Crown wishes to carefully consider the qualifications of the purchaser before granting mortgages for federal real property.

B. Assignment of Crown Debt Under The *Financial Administration Act*

The *Financial Administration Act*[86] (FAA) legislates activity, and security interests, relating to federal financial property. The FAA was created to provide for the financial administration of the Canadian Government and establishes and maintains Canada's accounts and the country's Crown corporations.

Sections 66 to 70 of the FAA govern the assignment of Crown debts. A Crown debt is defined in section 66 as follows:

"Crown debt" means any existing or future debt or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown.

Section 67 of the FAA further provides that, except as provided for in the FAA, or in any other act of Parliament, a Crown debt is not assignable and any transaction purporting to assign such debt will not confer any rights or remedies on any person in respect of the debt.

Section 68(1), however, offers an exception to the limitations prescribed by section 67. Section 68 of the FAA specifically states that an assignment may be made of a Crown debt that is an amount due or becoming due under *a contract* and any other Crown debt of a *prescribed class*. Section 68(2) further describes the assignment of the Crown debt: the assignment must be absolute, and made by the assignor; the assignment cannot be by a *charge* only; and notice of the assignment must be made in accordance with section 69.

Section 69 of the FAA, together with the *Assignment of Crown Debt Regulations*[87], creates a specific process by which notice of an assignment of Crown debt is to given. The following requirements apply: the notice must be sent to the Crown by registered mail; the notice must be in the proper form (as specified by the *Regulations*); and an original or notarial copy of the assignment contract must be included, together with copies of the specific invoice, the first page of the standing offer, and the contract issued under the standing offer.

This legislative scheme may create some difficulties in taking security in Crown debt. For example, is a debtor permitted to assign his or her income tax refund to a creditor? To what extent must the notice requirements be followed in order to obtain priority over other assignments of Crown debt? Case law has attempted to answer these questions.

Case law has examined whether or not the assignment of an income tax refund is permitted under the FAA. In *Marzetti v. Marzetti*[88], the Supreme Court of Canada found that an income tax refund is classified as a "Crown debt" under the FAA. Thus, as section 67 of the FAA prohibits the assignment of a Crown debt, the debtor's attempt to assign the income tax refund was unsuccessful. Furthermore, there was no section in the FAA or any other statute authorizing the assignment of income tax refunds. Thus, in the case of bankruptcy, the tax refund would be applied to the general pool of assets, and would not be directed to the assignee. This decision was followed by the Quebec Superior Court in the case of *Arthur Anderson Inc. (Re)*[89].

The British Columbia Supreme Court in *Bank of Montreal v. Guarantee Co. of North America* [90] considered the requirements of notice in relation to the assignment of Crown debt. In this case, two creditors claimed priority in book debts assigned by the debtor. One creditor failed to deliver notice to the Crown in strict compliance with the regulations. Justice Skipp decided that even though one party failed to comply with the regulations relating to notice, equity principles would determine the question of priority. Thus, the dates of the Crown's *receipt* of notice of the assignment would determine the dates of priority. This case was later reversed by the British Columbia Court of Appeal on the grounds that the specific clause in the indemnity document did *not* create an unqualified assignment (as required by the FAA) but instead provided for rights of subrogation.[91] However, the Court of Appeal made no comment on the trial judge's statements relating to when notice is deemed to be given. Nevertheless, the trial judge's opinion has been cited with approval in *Commercial Union Assurance Co. of Canada v. Surrey (City)* when Justice Huddart stated (in reference to *Bank of Montreal v. Guarantee Co. of North America*):

This assignment [meaning the indemnity executed by the contractor that operates as an assignment of a specific contract debt] will have priority over general assignments of

receivables held by a bank, provided that notice of such is provided to the owner prior to notice being provided by the bank.[92]

Thus, it appears that the trial judge's opinion with respect to the determination of notice under the FAA is good law.

C. Assignment of Payment Bond Debt Due to the Crown under the FAA

Sections 72 to 75 of the FAA also permit the assignment of a Crown right under a payment bond. For example, under section 73:

(1) Where an amount is due to the Crown under the provisions of a payment bond, a person who

(a) performed labour or services or supplied material in connection with the contract in respect of which the payment bond is held,

(b) is within a class of persons for the payment of which the payment bond is held as security, and

(c) has not been paid in full for the labour or services performed or material supplied by him in connection with the contract within the time provided in the payment bond for payment to the class of persons of which that person is a member,

is, *without any act or notice by or to the Crown, an assignee of the right of the Crown to recover an amount under the payment bond determine pursuant to subsection (2).* [emphasis added]

Thus, any person who fulfils the requirements as set out in (a) to (c) of section 73, is deemed to be an assignee of the Crown's right to recover any amount due under the payment bonds. These sections of the FAA have not been extensively considered by case law. Thus, it appears that this method of assignment of Crown receivables operates effectively.

D. Analysis and Conclusion

There is very little case law surrounding the security provisions of the *Federal Real Property Act*. Thus, it appears that the current scheme adequately meets the needs of the parties concerned.

Likewise, there are few cases considering the assignment of Crown debt under the FAA. Future changes to the legislation might incorporate additions to the definition of "Crown debt" or changes to the notice requirements. The legislation may also benefit from a declaration of the consequences of failing to comply with the notice requirements, as specified under the *Regulations*. Indeed, the parties to an assignment of Crown debt should be able to easily identify the priority of positions, based on the parties' compliance with the notice requirements. This would bring greater certainty to the question of priority, as between creditors.

As well, the *Assignment of Crown Debt Regulations* under the FAA specify the technicalities surrounding the giving of notice of an assignment of Crown debt. Notices of assignments must be mailed to a central Ottawa location. There is no provision within this scheme to co-ordinate notice with provincial PPSA registration systems. As well, there is no requirement that the creditor register its interest under provincial legislation. This lack of co-ordination may cause uncertainty and confusion. Thus, any future changes should attempt to provide notice under the provincial system as well.

VII. INDIANS AND LANDS RESERVED TO INDIANS

A. Current Statutory/Regulatory Scheme

The underlying goal of the personal property provisions of the *Indian Act* is to ensure that status Indians are protected from any efforts by non-Indians to dispossess them of the property they hold.[93] A summary of the relevant legislative and regulatory provisions is provided in Appendix G.

The personal property scheme is primarily governed by section 89 of the *Indian Act* which prohibits the "real and personal property of an Indian or a band situated on a reserve" from being subject to a "charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band." In short, personal property located on a reserve is exempt from seizure and execution by a creditor. Two exceptions to this rule are outlined in sections 89(1.1) and 89(2) respectively: a "*leasehold interest* in designated lands"; and agreements whereby the right of property or right of possession thereto remains wholly or in part in the seller.

Section 55 of the *Indian Act* establishes a land registration system, the "Surrendered and Designated Lands Register", whereby the registration of any "instrument that grants or claims a right, interest or charge in, or transfers, encumbers or affects Indian reserve, designated or surrendered lands" is effected.[94] As well, section 21 of the *Indian Act* establishes a "Reserve Register" by which certificates of possession or allotments to individual natives are registered. Together, these two sections are capable of registering the following instruments: certificates of possession or occupation, permits, relinquishments, sales, surrenders, cancellations, caveats, leases and mortgages.[95]

Section 28 of the *Indian Act* provides that any attempt to permit an individual, other than a band member, to occupy or use a reserve land or to exercise any rights on that reserve land (by deed, lease, contract, document or agreement) is void. Section 28(2) permits the Minister to grant an exception (for a period of one year) for a non-band individual to occupy or use reserve land, or to exercise any interest in the reserve land.

Section 58(3) of the *Indian Act* provides that the Minister may lease for the benefit of any Indian (on the Indian's application), the land of which the Indian is lawfully in possession.

B. Constitutional Jurisdiction

Under the *Constitution*[96], the provincial governments have exclusive jurisdiction over the property and civil rights of non-Indians. The *Constitution*, however, grants Parliament jurisdiction over "Indians and lands reserved for Indians"[97]. At first glance, the *Constitution* is unclear as to whether this Parliamentary jurisdiction should take the place of provincial personal property control. The courts have resolved this issue in *Attorney General of Canada v. Canard*, when the Supreme Court of Canada decided that Parliament has jurisdiction over the personal property of Indians.[98] In general, Parliament has limited its legislative control to property located on reserves, while provinces are free to develop legislation that applies to Indian property located *off* reserves.

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C. Problems and Issues With the Current Regime

1. Difficulties in Obtaining Valid Security

Two essential components of a successful business relationship are certainty and simplicity. Unfortunately, the current personal property regime under the *Indian Act* often provides neither for the native businessperson. Thus, banks and financial institutions, facing the possibility of not being able to obtain good security for loans, may hesitate to provide much needed financing to a native business or businessperson. As a result, economic growth and development on the reserve may be prevented.

2. Security Over Land

The current legislative scheme makes conventional mortgages and the use of reserve land as collateral extremely difficult to obtain. Section 89 of the *Indian Act* permits a non-native to take security over a leasehold interest in designated lands.[99] Unfortunately, however, the mortgage of a leasehold interest is often more complex than that of a freehold interest, and

because it provides less security to the mortgagee, a leasehold interest is often less desirable. [100] As well, according to s. 89(1.1) of the *Indian Act*, in order for the security to be effective, the reserve lands must be "designated". This necessitates a careful search by the mortgagee to ensure that the lands are "designated" as required. Once again, this requirement adds complexity to the transaction and may discourage institutions from lending to a project located on a reserve.

Once a leasehold interest has been mortgaged to a non-native, the mortgagee will want to register the interest to protect its claim. Section 55 of the *Indian Act* creates a federal Surrendered and Designated Lands Register under which the interest must be registered in order to preserve the claim.[101] Once again, critics have identified this registration scheme as a weakness of the regime.[102] First of all, when compared to the breadth of legislation governing provincial registration schemes, section 55 provides a bare framework for registration. Secondly, the "rudimentary structure" of the system provides little assurance that the registered interests are valid, and it provides no ability to guarantee the priority of the registrations.[103] As well, the registry is based in Ottawa - a fact that makes searches or registering interests costly and time consuming to perform. This disadvantage could be alleviated to some extent by establishing local Registries, organized on a regional basis. Finally, mortgagees will often insist that their interests be registered in the provincial land registry systems as well. Unfortunately, the federal government has often refused to allow title to reserve land to be raised in the provincial land registry system and the provincial law itself may prevent title from being obtained.[104] These factors may discourage banks and financial institutions from granting financing to projects located on reserves.

Section 58(3) of the *Indian Act* permits the lease of an Indian's land ("locatee leases"). These leases, however, cannot be granted as good and clear security. Section 28(2) also requires a Minister's permit before a lease can be mortgaged. These restrictions may contribute to delay and complication in the security process.

A number of changes could be made to the legislation to reduce complexity and streamline the security process. First sections 29 and 89(1.1) could be amended to provide that mortgages of lease leases are an exception to the rule in 89(1). As well, the legislation could be amended to provide that mortgages of leases under section 58(3) of the *Indian Act* and of designated lands should be automatically transferable or assignable from one creditor to another without requiring the Minister's consent (as long as the assignment of the security corresponds with the designated form). The process could be further simplified by eliminating the requirement for a section 28(2) Minister's permit to accompany the mortgage of a lease. Leases of reserve lands could also automatically include a right of way or easement to the property under the lease, and a legislative provision which declared that common law rights of prescription, rights of way or easement applied for leaseholders would accomplish this objective. Bands or band members could also be granted the ability to lease their own reserves. Certainty could be added to the registration system under the *Indian Act* by providing that registration of instruments under the Registers would provide indefeasible interests. Band by-laws and certain reserve land band council resolutions could also be published under a Gazette, in order to provide access to all potential secured creditors. These changes would streamline and simplify the process of obtaining security over Indian land.

3. Security Over Personal Property

Once again, the *Indian Act* makes it difficult for a lender to obtain security over personal property. Section 89(1) of the *Indian Act* prohibits the taking of security in personal property "situated on a reserve" by any person "other than an Indian or a band". For further clarification, section 90(1) of the *Indian Act* states that any personal property purchased by the Crown with Indian money or money appointed for that purpose, or property given to the band or band members, is deemed to be "situated on a reserve". For example, money given to a band member by the Crown and placed in a bank account located *off* a reserve is deemed to be "situated on a reserve" and therefore exempt from seizure or security.[105]

Unfortunately, there is no definitive answer regarding when property is considered to be "situated on a reserve". Case law has attempted to resolve this issue. Most cases that examine this question have been decided in the taxation context under s. 87 of the *Indian Act*, although the same principles have been applied in the personal property context as well.[106] Generally speaking, the location of personal property is its "actual location".[107] As well, a bank account is deemed to be situated in the location where it is payable. A bank account is payable where "in the ordinary course of business it would be paid and where the holder would seek payment, and that is the branch where he or she deals".[108] As well, the "paramount location

test", propounded in *Leighton v. B.C.*[109] and approved in *Mitchell*[110] confirms that the mere fact that property physically moves off the reserve does not mean that the property is not still protected by s. 89 of the *Indian Act*. As long as a "discernible nexus [remains] between the property concerned and the occupancy of the reserve",[111] the property is deemed to be situated on a reserve. For example, in *Kingsclear Indian Band v. J.E. Brooks & Assoc. Ltd.*, the Court determined that parking a bus on a reserve when not in use was enough to give the bus a sufficient "nexus" with the reserve in order to bring it under the protections offered by s. 89.[112]

Nevertheless, under s. 89(2) if a seller retains the right to possess the property, the property is not protected from seizure by s. 89(1).[113] Thus, property purchased under a conditional sales contract is available for seizure by the seller whether or not the property is located on the reserve.[114]

Furthermore, section 89 of the *Indian Act* does not protect a limited company from seizure, nor does the *Indian Act* protect the personal property of a tribal council if the council is a corporation. The corporation is *not* protected because it is not an "Indian" or a "band" within the meaning of section 89.[115] Conversely, the property of an unincorporated band council is exempt from seizure and garnishment.

A number of these problems may be solved by permitting an Indian or a band, upon receiving independent legal advice, to contract out of section 89 of the *Indian Act* for financing purposes.

4. Provision of Guarantees

Due to the lack of traditional security available to lenders, banks and financial institutions, a guarantee of the investment may be required. Often the provincial or federal governments are asked to provide guarantees or letters of comfort.[116] As well, the Indian band and its members may also be asked to provide guarantees, although the enforceability of this guarantee is questionable in that enforcement is subject to the limitations of the *Indian Act* and the personal property regime.[117]

5. Garnishment

Section 89 of the *Indian Act* prohibits a non-Indian from garnishing an Indian's personal property that is situated on a reserve. On the other hand, garnishment legislation may be used between Indians in order to obtain execution against assets which are otherwise protected under section 89 of the *Indian Act*.[118] In addition, the courts have held that garnishment against a band may be more difficult,[119] while garnishment of a tribal council's account is not protected.[120] A tribal council is a corporation and not an "Indian" or a "band" as defined in the *Indian Act* and so is therefore not protected under section 89 and 90.

To determine whether personal property of a status Indian is subject to garnishment, the courts have also applied the "connecting factors test" as laid down in *Williams v. Canada*.[121] In *Williams*, the Court determined that, a number of relevant connecting factors must be taken into account, when deciding whether or not unemployment insurance benefits received by a status Indian were subject to taxation. These factors included (1) the residence of the debtor; (2) the residence of the person receiving benefits; (3) the place where the benefits are paid; and (4) the location of the employment income. The courts have recently applied this approach to determine whether or not wages paid to a status Indian are subject to garnishment.[122]

6. Application of s. 89 of the Indian Act to land

Section 29 of the *Indian Act* provides that reserve lands "are not subject to seizure under legal process". Thus, given the protection offered by section 29, section 89 is somewhat redundant. It is unknown, however, whether the protection offered by section 29 is intended to address the same issues covered under section 89.[123] although section 29 appears to offer greater protection in that it contains no exception allowing for the seizure of lands by other Indians.[124]

7. Ability of Band Councils to Bind Subsequent Band Councils

Of concern to the secured lender will be the legal status of a band under the *Indian Act*. Under section 2 of the *Indian Act*, an Indian band consists of "a body of Indians" and is not an incorporated entity. Thus, the band council's ability to enter into legally binding agreements on behalf of the band is uncertain. As well, a lender may want assurance that a subsequent band council will honour the contractual obligations arranged by the previous band council. The legal status of the band and its council make this outcome uncertain as well.

Some recent court decisions have held that a band has the capacity to sue and be sued, while other decisions have held that a band is not a person, does not hold corporate status, and is unable to hold real estate.[125] Although it could be argued that because bands and band councils are exercising certain contractual powers and should therefore incur corresponding obligations, the uncertainty surrounding this issue may discourage lenders from financing worthwhile developments by bands and band councils.

There are a number of changes that could be made to the *Indian Act* to resolve the uncertainties of this issue. First, the *Indian Act* requires a much clearer definition of a "band" and the band's legal capacity must be clearly identified. As well, the band's legal capacity should be that of a "natural person", including the ability to sue and be sued.

D. Attempts to Obtain Valid Security

Several steps can be taken in order to avoid the restrictions created by the *Indian Act*'s personal property regime.

1. Federal Government to grant exemption under s. 4(2) of the Indian Act

Although s. 4(2) gives the Department of Indian and Northern Affairs the ability to grant exemptions from the personal property regime, the Department's policy is to refuse all exemptions.[126] This policy imposes additional hardships on natives, as a status Indian remains a status Indian for life, regardless of whether the native resides on or off the reserve. For example, money in a bank account that was given to a status Indian pursuant to an agreement to which the Federal government was a party, is deemed to be "situated on a reserve", regardless of where the bank account is located. Thus an off-reserve status Indian may have difficulty obtaining financing as the money in the bank account will always be deemed to be "on-reserve", and therefore exempt from seizure. Political and legal challenges may be required to change the status quo.

2. Structure of the transaction

The restrictions imposed by s. 89 can be successfully avoided by structuring all transactions such that the vendor retains a right of possession in the property.[127] For example, the vendor of a vehicle may sell the vehicle to an Indian under a conditional sales contract such that the vendor may take possession of the vehicle if the Indian fails to make payment on the contract. Unfortunately, this structure may not be practical for all transactions.

3. Allow for seizure by a status Indian

Under the *Indian Act*, a status Indian is permitted to seize the property of a fellow status Indian or band. Thus, one solution is for the lender to have a status Indian on its Board and to make the Board Member a party to the contract. Thus, because the status Indian is a party to the contract, the lender will be able to realize on its security.[128]

E. First Nations Land Management Act[129]

The *FNLMA* came into force on June 17, 1999 and ratified the *Framework Agreement on First Nations Land Management Act* (the "*Framework Agreement*"). The *FNLMA* applies to the fourteen First Nations that developed the legislation and signed the *Framework Agreement* in February of 1996. Its inception will thus affect the *Indian Act's* land registration system in a number of ways.

The *FNLMA* permits the signatory First Nations to develop their own reserve land and resource management regimes. In essence, the participating First Nations are able to opt out of the *Indian Act's* relevant land management sections. Each of the First Nations may develop

and adopt a "land code" that addresses the use, possession and occupancy of the First Nations' lands, as well as the division of land upon the breakdown of a marriage. Once certified, a copy of a First Nation's land code must be available for public inspection.[130]

The relevant sections of the *FNLMA* permit the First Nations to establish unique land registration regimes. For example, the First Nations are granted the authority to enact laws in relation to "interests in and licenses in relation to first nation land" (s. 20(1)(a)) and the "creation, acquisition and granting of interests in and licenses in relation to first nation land and prohibitions in relation thereto" (s. 20(2)(b)). In addition, section 25 of the *FNLMA* grants the Governor in Council, on the recommendation of the Minister, power to establish a "First Nation Land Register" that is similar to the Register established under section 21 of the *Indian Act*. The *FNLMA* provides for the making of regulations with respect to the administration of the First Nation Land Register, the effects of registering interests, including priorities, and the payment of fees for registration (s. 25(3)).

F. The Impact of the FNLMA on the Indian Act Registration Regime

The *FNLMA* only applies to First Nation land and thus the regime established by the *Indian Act* in relation to personal property is not affected by the *FNLMA*. Currently, the *FNLMA* only applies to the fourteen First Nations listed in Schedule 1 of the *FNLMA*. Additional First Nations may become signatories if they wish.

Once a First Nation land code is brought into existence, certain sections of the *Indian Act's* land registration regime cease to apply to the First Nation's land and members. For example, section 55 of the *Indian Act*, which establishes a "Surrendered and Designated Lands Register", ceases to apply. Instead, the *FNLMA* creates a new register, similar to the section 21 Register created by the *Indian Act*, but broader in scope. As well, the ability to secure a leasehold interest on First Nation land under section 89(1.1) of the *Indian Act* remains - the *FNLMA* even permits the land code to extend the application of section 89(1.1) to "other leasehold interests in first nation land" (s. 38 of the *FNLMA*). The general security regime comprised of sections 89(1) and 89(2) of the *Indian Act* remains intact.

The *FNLMA* also clarifies the legal capacity of First Nations and grants to a First Nation, for purposes related to First Nation land, the legal capacity to borrow, contract, acquire real and personal property, expend and invest money, and be a party to legal proceeding.[131] As well, any body created by the First Nation in order to manage the First Nation land would have the legal status of a person. In contrast, the *Indian Act* provides no specific provision in regards to the legal status of Indian bands. As previously discussed, this omission creates uncertainty for lenders. The *FNLMA's* clarity on this issue would provide greater certainty for secured lenders.

Unfortunately, the land regime created by the *FNLMA* fails to produce a simplified registration regime. In fact, numerous land codes will only increase the complexity surrounding the taking of security in First Nation land. Two national Registries will now be established – each performing essentially the same functions, but adding complexity to the system. Registration and searching will be time consuming and expensive to perform. As well, the *FNLMA* merely gives the Governor in Council the ability to make regulations relating to "priorities" of interests. As no regulations have been passed to date, this issue remains unresolved.

G. Intellectual Property in Cultural and Artisan Rights

Section 91 of the *Indian Act* prohibits the sale of certain artefacts situated on reserves. These artefacts include: Indian grave house poles, carved grave poles, totem poles, carved house poles and rocks embellished with paintings or carvings. This section also appears to apply to reserve land held under a certificate of possession.[132] Obviously, this section limits the ability of Indians to use artefacts as security.

The imposition of common trademark and copyright structures on the native culture is somewhat difficult to achieve. Native traditions do not easily lend themselves to the protections established under intellectual property law.[133] As well, it is unclear whether the personal property provisions of the *Indian Act* apply to intellectual property of natives. Thus, it is uncertain whether a creditor would be able to take effective security in the "intellectual property" of a native band or individual.

VIII. NON-CONSENSUAL FEDERAL SECURITY INTERESTS

Unlike a security interest created under a PPSA, a non-consensual security interest arises by operation of law, rather than by an agreement among interested parties.[134] The non-consensual security interest creates an interest in the debtor's property, in order to secure payment. A summary of the federal legislative and regulatory provisions which create non-consensual security interests is provided in Appendix H.

A. Statutory Provisions

There are several federal statutes that create non-consensual security interests.

The *Excise Tax Act*[135] permits the Minister to take security in any amount or form that is satisfactory to the Minister for the payment of any amount that may become payable or remittable under the Act.[136] Section 316 permits the Minister to issue a Ministerial Certificate, which can be registered in the Federal Court and has the same force and effect as a judgment. Likewise, section 317 of the Act proposes a method by which the Minister can garnish the amounts payable from money owed to the debtor. The practical effect of this garnishment is such that the monies become the property of Her Majesty. Section 222 of the Act also creates a deemed trust provision, similar to section 227 of the *Income Tax Act*. Parliament has now introduced Bill C-24 with the intention of harmonizing the deemed trust provisions under the *Excise Tax Act* with section 227 of the *Income Tax Act*.

Several sections of the *Income Tax Act*[137] (ITA) also create a scheme to impose non-consensual security interests. These security interests arise when a debtor has failed to remit source deductions (i.e. income tax) to the Minister. Section 223 permits the Minister to obtain and register a Ministerial Certificate in respect of amounts payable under the Act. Once the certificate is registered, the certificate acts as a judgment of the Federal Court against the debtor. Section 223 also permits writs to be issued pursuant to the certificate in order to create a charge on land and property. When a charge, lien, priority or binding interest is created under subsections 223(5) and 223(6) of the ITA and is registered in accordance with subsection 87 (1) of the BIA it is deemed to be a claim that is secured by security and that, subject to subsection 87(2) of the BIA ranks as a secured claim under the BIA.

Section 224 of the ITA is similar to section 317 of the *Excise Tax Act* in that it also creates a form of garnishment procedure. Under section 224, if a tax debtor fails to remit amounts owed to the Crown (such as source deductions for employees), the Minister may order that any payments to be made to the taxpayer are to be paid to the Receiver General instead. As under the *Excise Tax Act*, the effect of garnishment under this section of the ITA is to make the accounts the property of Her Majesty. Section 224 also captures payments which, but for the security interest of the Crown, would be owed to the tax debtor.

Section 227 of the ITA creates a "deemed statutory trust" with respect to amounts that a tax debtor is required to withhold pursuant to regulations made under section 153(1) of the ITA. This trust is created regardless of whether or not the taxpayer withheld the amount payable under the ITA, and is held in priority to security interests other than "prescribed" security interests. These "prescribed" security interests have now been more thoroughly defined in regulations under the ITA.[138]

Section 23 of the *Canada Pension Plan*[139] also creates a deemed statutory trust similar to that of the ITA, as does section 86 of the *Employment Insurance Act*[140] such that all amounts that unremitted amounts under these acts are deemed to be held as a trust for Her Majesty. Section 126 of the *Employment Insurance Act* and section 66(2.7) also provides for garnishment procedures.

The *Security for Debts Due to Her Majesty Regulations*[141] state that a Minister responsible for the collection or recovery of any debt or obligation due to Her Majesty. The Minister is also permitted to execute and deliver, upon payment of any debt, obligation, or claim (or portion thereof), any instrument that will release or discharge any security accepted in respect of the debt, obligation or claim.

Section 13 of the *Radiocommunication Act* and section 74.1 of the *Telecommunications*

Act state that where an individual is convicted of certain specified offences related to radio communications or telecommunications, the apparatus in relation to which or by means of which the offence was committed may be forfeited to the Crown.[142] Pursuant to these provisions, the Crown is obligated to publish a notice of the forfeiture in the *Canada Gazette*. Once this notice is published, anyone who "claims an interest in the apparatus as owner, mortgagee, lien holder or holder of any like interest" may make an application to any superior court of competent jurisdiction for an order declaring that his interest is not affected by the forfeiture and declaring the nature and extent of his interest and the priority of his interest in relation to other interests. In addition, the court may order that the apparatus to which the interests relate be delivered to one or more of the persons found to have an interest therein, or that an amount equal to the value of each of the interests so declared be paid to the persons found to have those interests.[143]

While most of the comments in this section address the provisions of the ITA, these comments can be generalized to the provisions identified under the *Excise Tax Act*, the *Canada Pension Plan*, the *Employment Insurance Act*, the *Radiocommunication Act* and the *Telecommunications Act*.[144]

B. The *Income Tax Act*, the *Excise Tax Act* and the Deemed Statutory Trust

The main issue surrounding the creation of the deemed statutory trust is the extent to which the Crown's deemed trust may claim priority over any other security interests. For example, to what extent may the Crown claim priority over a bankrupt's estate (for unremitted source deductions) when other secured creditors have registered claims as well? Historically, the scheme governing non-consensual and consensual security interests has received criticism for its inability to confidently predict the resolution of a priority dispute between a deemed trust and a consensual security interest.[145]

Deemed statutory trust provisions have evolved throughout the years as well. Earlier deemed trust provisions provided that the employer was deemed to hold the money collected in trust for the Crown. Unfortunately, these provisions failed to specify that the money was held in trust regardless of whether or not it was set aside.[146] Thus, if the taxpayer failed to set aside money in trust, the Crown was put in the position of claiming an interest in a "non-existent" trust account. As well, withholdings of tax under the ITA are commonly done as a book entry and therefore the deductions are merely notional; no money is actually transferred to the Receiver General.[147]

To address these uncertainties, Parliament enacted versions of sections 227(4) and (5) of the ITA which stated that a person who deducts monies for income tax purposes is deemed to hold them in trust for the Crown and that the money would be deemed to be held separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not the monies had actually been kept separate and apart.[148] It was Parliament's intention that these provisions would provide for a clear and unambiguous priority scheme.

Royal Bank of Canada v. Sparrow Electric Corp. is the pivotal case regarding the issue of priority between deemed statutory trusts and consensual security interests.[149] In this case, the Bank claimed priority over the Crown's deemed statutory trust (created by section 227 of the ITA) by virtue of its prior general security agreement (GSA) and its *Bank Act* security. At trial, the court held that the Crown's deemed trust took priority over both the *Bank Act* security and the Bank's GSA. On appeal, the Alberta Court of Appeal held that the *Bank Act* security took priority over the Crown's deemed trust and gave no opinion on the priority of the GSA.

On appeal to the Supreme Court of Canada, a majority of the Court held that the deemed trust created under section 227 of the ITA was subject to the Bank's security interest. In writing for the majority, Justice Iacobucci states:

"The deeming trust is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is *first* determined that there is some unencumbered asset out of which the trust may be deemed."[150]

Thus in *Sparrow*, the inventory was subject to the Bank's security interest at the moment the taxes came due and was not an unencumbered asset. Therefore, the Crown's deemed trust did

not take priority over the Bank's security.

The Court concludes by stating that the courts should not interfere with the general security agreement (an important financing device relied upon by lenders) unless the statute clearly mandates the interference.[151] Thus, the majority challenged Parliament to produce more clear, unambiguous legislation. Justice Iacobucci stated:

"That is not to say, however, that Parliament could not legislate otherwise. Parliament has shown that it knows how to assert priority over rival security interests. See *Alberta (Treasury Branches) v. M.N.R.* [1996] 1 S.C.R. 963, at p. 975. All that is needed to overtake a fixed and specific charge is clear language to that effect. (at p. 431)

....

Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) of the ITA, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to an such security interest". All that is needed to effect the desired result is clear language of that kind. (at p. 432)"[152]

Parliament enacted amendments to the *Income Tax Act* in June 18, 1998, with retroactive application to June 15, 1994. These enactments were intended to clarify the Crown's priority over certain assignments of inventory. Generally speaking, the effect of the newly worded provisions is to "give the statutory deemed trust priority over pre-existing creditor charges and security interests, with the exception of pre-existing land charges".[153] The new ITA provisions provide more specifically that any person who deducts or withholds an amount under the ITA is deemed to do so "notwithstanding any security interest"[154] and such amount is deemed to be held in trust, notwithstanding any act of Parliament. The deemed trust is limited in that it includes only unremitted employee deductions and the principal amount. Case law has held, however that Revenue Canada cannot assert a deemed trust claim over interest and penalties that have accrued.[155] These sections state that any deemed trust amount was to be held "from the time the amount was deducted or withheld by the person, separate and apart from the property of the person" and these amounts are to form no part of the person's estate. Such amounts are also deemed to be beneficially owned, notwithstanding any security interest in such property.

While Parliament has attempted to clarify the priority rules surrounding statutory deemed trusts and consensual security interests, it appears that the ITA provisions are not "fool-proof", so to speak. Sections 227 and 224 of the ITA were recently considered in a decision by the British Columbia Supreme Court: *Royal Bank of Canada v. Tuxedo Transport Ltd.*[156] This case examined whether or not future book debts are subject to the priority and trust provisions created by sections 227(4) and 227(4.1) of the ITA. Justice Burnyeat, after examining the ITA provisions, stated that "[t]he clear intent of those provisions is that it is only property in existence which is subject to the trust in favour of Her Majesty".[157] Thus, in this case, the Crown cannot claim a trust interest over book debts that had not arisen at the time the amounts payable under the ITA became due. As Justice Burnyeat explained the situation, "[i]t would not be possible for the debtor or secured creditor to hold that which does not exist from the time the amount was deducted or withheld".[158] In short, the court strictly construed the deemed trust provisions and held that the deemed trust could not extend to "after-acquired property".[159]

Although this case is currently on appeal to the British Columbia Court of Appeal, the approach taken by Justice Burnyeat has been followed in a decision from the Saskatchewan Court of Queen's Bench. In the case of *First Vancouver Finance v. Canada (Minister of National Revenue – M.N.R.)*, Justice Wimmer examined whether or not the deemed trust provisions applied in the case of monies payable on factored accounts.[160] In this case, First Vancouver Finance purchased Great West invoices at a discount and therefore became the "owner" of the debts. At the time, Great West owed money to Revenue Canada for unremitted payroll deductions and goods and services tax. The Crown attempted to garnish payments made by Great West customers to First Vancouver Finance, in accordance with the factoring agreement. Justice Wimmer held that:

"The Great West delinquencies in respect of payroll deduction remittances referred to in Revenue Canada's Requirement to Pay arose and were assessed prior to the time when those

Canada Safeway invoices [a Great West customer] which were assigned by Great West to First Vancouver came into existence. The accounts were "after acquired property" and not, according to Mr. Justice Burnyeat, subject to the deemed trust."[161]

Thus, while this decision has confirmed the court's "after-acquired property" approach, as applied in *Tuxedo*, it remains to be seen whether additional uncertainties will arise regarding Parliament's latest attempt to assure its priority claim over all other security interests.

Section 222 of the *Excise Tax Act* also creates a deemed statutory trust, however the wording corresponds to the "pre-*Sparrow*" provisions of the ITA and as such are not considered effective against an assignment of rights in property to secured creditors.[162]

C. Enhanced Garnishment Under the *Income Tax Act* and the *Excise Tax Act*

Section 224 of the ITA and section 317(3) of the *Excise Tax Act* permit Revenue Canada to issue garnishee letters known as "Requirements to Pay" in order to collect accounts receivable from debtors. These sections further provide that any payment made in accordance with these letters are in priority to any security interest in them – thus the term "Enhanced Garnishment".[163] A Requirement to Pay issued under the ITA is effective for a year while one issued under the *Excise Tax Act* is effective for only 90 days, although proposed amendments suggest the ability to extend this limit to one year. As well, the Requirement to Pay is restricted to accounts receivable, although Revenue Canada may serve a garnishee letter on lending institutions which are about to advance monies to a tax debtor which are secured.[164]

Uncertainties surrounding the garnishment provisions of these sections relate primarily to the definition of "security interest". However, it is now well settled law that "in a non-bankruptcy scenario, an assignment of book debts does not prevail against a Requirement to Pay served pursuant to either of these two sections [s. 224(1.2) of the ITA and s. 317(3) of the *Excise Tax Act*]".[165]

The Supreme Court of Canada has held that absolute and unconditional assignments of accounts receivable (as in factored accounts) will escape the effect of Enhanced Garnishment under the ITA (or *Excise Tax Act*). In *Alberta Treasury Branches v. Canada (Minister of National Revenue – M.N.R.)*, the majority held that a secured creditor, within the definition of the legislation, excluded creditors who owned property absolutely.[166] Thus, in this case, an assignment of book debts was classified as a continuing collateral security interest, and not an absolute assignment (and therefore the holder was deemed to be a secured creditor). The Court also held that the assignment of book debts was a security interest.

In *First Vancouver Finance*,[167] the court held that a Requirement to Pay did not obtain priority over accounts receivable that were factored (or sold) prior to the service of the Requirement to Pay. The Requirement to Pay, however, did maintain priority over accounts that were factored after the service.

One distinction that can be made between section 317(3) of the *Excise Tax Act* and s. 224(1.2) of the ITA is that the *Excise Tax Act* provision does not include an override of the *Bankruptcy and Insolvency Act*. The result is that claims under the *Excise Tax Act* (being G.S.T.) fall to be determined by the *Bankruptcy and Insolvency Act* (the BIA). Under the BIA, Crown claims, including G.S.T. claims under the *Excise Tax Act*, would be treated as unsecured claims. To resolve this distinction, Revenue Canada could assert a "property" claim under the bankruptcy and thus, in relation to G.S.T., the Crown could use the legislation and common law tracing principles to "trace" any G.S.T. owed.[168] Given that the language refers to "property of Her Majesty" after service of a Requirement to Pay, the trust claim would be reserved for those accounts to which the notice relates which are in existence at the date of bankruptcy. The question also arises as to whether, in the case of property which has passed to Her Majesty, "enhanced" tracing would occur.

D. Certificates Issued Under s. 223 of the *Income Tax Act* and s. 316 of the *Excise Tax Act*

As discussed in Part A of this section, both the *Income Tax Act* and the *Excise Tax Act* permit the registration of Ministerial Certificates in the Federal Court. Once registered, these Certificates obtain the same force as "judgments". The Federal Court may then issue a writ which may be registered against property of the debtor, including land. Upon registration, the

writ creates a charge, lien, priority on, or binding interest in the property or land. The writ may then be enforced as any other writ.

In a non-bankruptcy situation, any writ issued pursuant to the processes under the ITA and the *Excise Tax Act* is unsecured and becomes subordinate to any other prior interests.[169] Under bankruptcy, at least in the case of a writ issued under the ITA, the situation changes. On bankruptcy or in the event of a Division I proposal, the writ becomes a "deemed security interest" under the *Bankruptcy and Insolvency Act* if the writ is registered before the earlier of: (a) the date of filing of the petition; (b) the date of assignment into bankruptcy; (c) the date of filing a Notice of Intention to File a Proposal; or (d) the date of filing the proposal.[170] Unfortunately, this exception does not apply to writs registered in accordance with the *Excise Tax Act*.

E. Analysis and Conclusion

While Parliament has clearly attempted to draft its legislation to create unequivocal statutory deemed trusts and priorities in favour of the Crown, uncertainties and ambiguities still exist. Case law has consistently confirmed that "the court should not interpret legislation so as to deprive third parties of pre-existing property rights unless Parliament makes its intention clear and unambiguous in the wording of the statute".[171] Thus the courts, by interpreting these provisions, have applied narrow and strict readings to these statutes, often rendering ineffective the statutory priority and deemed trust provisions.[172] Parliament is then forced, once again, to remedy these statutory imperfections.

Commentators have called for a comprehensive legislative solution to address the conflicting priority issues relating to consensual and non-consensual security interests.[173] Legislative flaws usually fall into two categories: either the statute fails to adequately specify the property to which the non-consensual security interest attaches, or the legislation fails to properly identify the subordinate parties.[174]

It remains to be seen whether further legislative amendments will resolve the remaining uncertainties with respect to priority claims under non-consensual security interests. Clearly, unambiguous and comprehensive legislative amendments are required to establish absolute priority of the Crown, if that is what Parliament intended.

IX. BANKRUPTCY ISSUES

The provincial *PPSA* ensures that secured creditors enjoy two important advantages over unsecured creditors: (1) Secured creditors can seize and sell collateral without having to seek judicial or other third party assistance and (2) secured creditors, provided they follow the appropriate registration procedure, are given priority in the distribution of proceeds from the forced sale of collateral. The federal *Bankruptcy and Insolvency Act* ("*BIA*") does not change this basic structure. The *BIA* does, however, impact on secured creditors in a multitude of different ways, with the result that the provisions of the *BIA* represent an important factor in the decision-making process of secured creditors faced with a defaulting debtor. For the most part, the impact of the *BIA* actually enhances the position of secured creditors, thereby encouraging them to petition insolvent debtors into bankruptcy. A summary of the relevant legislative and regulatory provisions is provided in Appendix I.

A. The Impact of the *BIA* on Priorities

Sections 136 to 147 of the *BIA* sets out a scheme for determining priorities among creditors in the event of bankruptcy. The list of priorities set out in s. 136 is made "*Subject to the rights of secured creditors*". In other words, the priority scheme that prevails under the *PPSA*, which gives secured creditors who have properly registered their security first priority, after only statutory Crown trusts and liens, remains intact under the *BIA*: Secured creditors are permitted to realize their security as if there were no bankruptcy.[175] In fact, in respect of statutory Crown trusts and liens, the priority position of secured creditors may even be better under the scheme established by the *BIA*.

1. Crown Claims and Secured Creditors under the *BIA*

The relative priorities of statutory claims and secured creditors are significantly affected, and

in many cases reversed, if the debtor becomes bankrupt.[176] Section 86(1) of the *BIA* provides that all claims of the federal and provincial Crown, including secured claims, and all claims of a workers' compensation body rank as unsecured claims in a bankruptcy, unless the claims have been registered in the manner contemplated by s. 87. Section 87 requires that Crown securities be registered in a general system of registration of securities that is available to any creditor and is open for public inspection. In provinces with *PPSA* legislation, this would mean that Crown securities would have to be registered under the *PPSA*. Section 87(2) ensures that Crown securities registered under the *PPSA* will not have any super-priority over other secured claims. Crown securities are subject to the same "first to register" formula for determining priority as are other secured creditors.

Section 67(2) of the *BIA* provides that, notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision. Accordingly, in order to take priority the deemed trust must be valid at common law. The only exception to this rule is made for the claims of Revenue Canada for income tax source deductions and for Employment Insurance and Canada Pension Plan remittances [s. 67(3)].

2. Landlord's Right of Distraint under the *Commercial Tenancies Act*

The *Commercial Tenancies Act* gives landlords the right to seize and sell the assets of tenants in order to satisfy arrears of rent.[177] The right of distraint applies to all goods on the premises that are owned by the tenant, regardless of whether they are subject to a security interest. Furthermore, case law has held that the right of distraint is not limited to the extent of the tenant's equity in the goods: *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd.* (1980), 29 O.R. (2d) 106, aff'd 32 O.R. (2d) 703. It is also worth noting that a landlord can seek to distrain even after a receiver takes possession of the premises.[178]

A landlord's right to distrain is significantly affected where a bankruptcy intervenes. Section 136(1)(f) of the *BIA* provides that upon the bankruptcy of the tenant, the landlord's right to distrain is replaced by a preferred claim for up to three months arrears of rent and three months accelerated rent. As preferred claims are subject to the rights of secured creditors, the practical effect of s. 136(1)(f) is to give secured creditors priority over landlords seeking to distrain. The result is often a race between landlord and secured creditor to see which party will move more promptly to exercise its rights.[179]

The above-noted examples illustrate how the position of secured creditors in respect of priority can be strengthened considerably in the event of bankruptcy. This strengthening of position should be kept in mind by a secured creditor planning its strategy in a situation where a possibly insolvent debtor has defaulted. The courts have ruled that there is nothing wrong with a secured creditor petitioning the debtor into bankruptcy in order to obtain priority over a preferred creditor: *Re Fresh Air Fireplaces of Canada Ltd.* (1986), 62 C.B.R. (N.S.) 39, aff'd 65 C.B.R. (N.S.) 21 (Alta. C.A.). This ruling makes the *BIA* a potentially useful strategic tool in the hands of secured creditors.

B. Notice Requirements under the *PPSA* and the *BIA*

1. Notice Requirements under the *PPSA* and at Common Law

Section 63(4) of the *PPSA* requires secured creditors to give not less than fifteen days notice to the debtor and other interested parties before disposing of the collateral. Section 63(7) describes circumstances in which such notice is not required. For example, notice is not required where the collateral is perishable or where the secured party believes on reasonable grounds that the collateral will decline speedily in value. "Reasonable grounds" is determined in accordance with the case law. The common law imposes its own notice requirement on secured creditors. The leading case of *Lister v. Dunlop* (1982), 135 D.L.R. (3d) 1 established that secured creditors must provide reasonable notice, to be determined in light of all of the surrounding circumstances, before enforcing their security.[180] The courts have recognized that in certain circumstances it may be reasonable for a creditor to give little or no notice before taking steps to enforce its security. For example, the creditor may have a justifiable apprehension of dishonesty on the part of the debtor or that the collateral will be dissipated.[181]

The common law requirement to give reasonable notice places the secured creditor in the difficult position of having to determine, typically armed with imperfect information, what constitutes reasonable notice in the circumstances. The decision is one that must be made with care, as the result of insufficient notice may be a substantial claim for damages against the enforcing creditor. As compared with the common law requirement, the fifteen-day notice period prescribed by the *PPSA* actually represents a welcome measure of certainty for secured creditors.

2. The Notice Requirement under the *BIA*

Section 244(1) of the *BIA* provides that secured creditors intending to enforce a security on all or substantially all of (a) the inventory, (b) the accounts receivable or (c) the other property of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, notice of that intention. The section 244 notice requirement prevails over security agreements which provide for immediate enforcement upon default. Service of the section 244 notice triggers a ten day statutory freeze during which secured creditors are prohibited from enforcing their security. The ten-day freeze is designed to allow the debtor time to attempt to put its financial affairs in order. It applies only to insolvent, as opposed to bankrupt debtors, as presumably the extra time would be of no use to the latter.[182]

While at first impression s. 244 might seem to impose a burden on secured creditors, the ten-day notice requirement actually provides some welcome certainty to secured creditors trying to determine what constitutes reasonable notice. As long as the debtor is insolvent and no special circumstances exist, secured creditors can be confident that the ten day notice will be sufficient to satisfy the common law demand to provide reasonable notice. This is preferable to having to guess at what a court might consider to be reasonable notice under the circumstances. The fact that the notice period is shorter than that provided for under the Ontario *PPSA* is also to the benefit of secured creditors.

The risk that debtors might dispose of the collateral during the ten-day notice period is dealt with in s. 47 of the *BIA*. Section 47 allows the court to appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the s. 244 notice relates. The court has the authority to bestow broad powers on the interim receiver, including the power to take possession of the debtor's property or exercise control over the debtor's business. In order to obtain the appointment of an interim receiver, the onus is on the applicant creditor to show that the appointment is necessary for the protection of (a) the debtor's estate or (b) the interests of the creditor. To come within (b), the creditor must show that there is an actual and immediate danger of dissipation of the debtor company's assets to the detriment of the creditor's security: *Royal Bank v. Zutphen Brothers Construction Ltd.* (1993), 17 C.B.R. (3d) 314 (N.S.T.D.).

Similar to s. 244, s. 47 creates a statute-sanctioned procedure for what would otherwise be a "self-help" decision on the part of the creditor. Obtaining the court's sanction may be preferable to taking immediate enforcement steps based on the belief that assets are about to be squandered. The latter action exposes creditors to the risk of liability, a risk that is often difficult to assess beforehand.

In terms of the requirement to give notice, the *BIA* helps both creditors and debtors by adding certainty to an otherwise uncertain process. The procedures established under ss. 244 and 47 improves the lot of the secured creditor as compared to a situation involving a non-insolvent debtor.

C. The Interplay Between the *BIA* and the Customs Act

The *Customs Act* provides that the Crown is entitled to a lien against all goods imported into Canada for which duty has not been paid.[183] Typically the duty is paid by a customs broker on behalf of the importer. The customs broker adds the cost of the duty to its account for reimbursement by the importer. Case law has established that, as the sole purpose of this lien is to secure a claim of the Crown, the customs broker is entitled to step into the shoes of the Crown.[184]

A problem arises where a customs broker acquires possession of goods against which the Crown has a lien for unpaid customs duties, and the importer subsequently becomes insolvent

or goes bankrupt. Section 87 of the *BIA* provides that a statutory lien whose sole purpose is to secure a claim of the Crown is only valid in relation to a bankruptcy if it is *registered*. Section 87 is silent as to security interests perfected by possession. As custom brokers' liens are not usually registered, the effect of s. 87 is to invalidate the lien. As the customs broker is thus not considered to be a secured creditor, s. 69 of the *BIA* ensures that upon the filing of a notice of intention or of a proposal the customs broker will be unable to take any enforcement remedy against the property it holds, including disposing of same. At the same time, if the customs broker releases the property to the importer, it loses its status as a perfected secured creditor pursuant to provincial PPSA legislation. The result is that the customs broker may end up retaining possession of the goods indefinitely, with no right to enforce its security.[185] In terms of commercial realities this creates a lose-lose situation. Goods retained by the customs broker for an extended period of time are likely to lose much of their value. Not having access to its inventory puts an insolvent debtor in an impossible position in terms of staying afloat and putting forth a realistic proposal. Other creditors also stand to lose if the value of the collateral decreases.

The legal stalemate created by the interplay between the *Customs Act* and the *BIA* has been the subject of judicial criticism. The case of *Solemate Calderone Corp. v. Peace Bridge Brokerage Ltd.* (July 21, 1998), Toronto 31-346242 (Ont. Gen. Div., per Farley J.) [hereinafter "*Solemate Calderone*"] involved a shoe store chain ("Solemate") that had filed a Notice of Intention to File a Proposal and was in the process of trying to put together a reasonable proposal. Solemate's efforts in this regard were thwarted by the fact that Peace Bridge, a customs broker to which Solemate owed some $300,000, had seized a large shipment of goods. The goods in question were seasonal shoes, the value of which would quickly diminish if left to languish in storage. Solemate argued Peace Bridge should be forced to relinquish the goods, as possession of the goods was crucial to the success of its proposal. Peace Bridge argued that giving up the goods would cause it to lose its possessory lien pursuant to the PPSA. Peace Bridge also relied on the contract between itself and Solemate, which provided that Peace Bridge was entitled to retain possession of goods until it had been paid in full. Farley J. held that as a matter of contract Peace Bridge was not required to give up possession of the goods. However, the court also held that pursuant to s. 69 of the *BIA*, Peace Bridge was not entitled to sell or dispose of the goods. The court went on to criticize "the awkwardness of the *BIA* and meshing it with the *Customs Act*", but refused to grant Peace Bridge a stay under s. 69(4) of the *BIA* to allow it to dispose of the goods.

The problems canvassed in *Solemate Calderone* could be solved if the *BIA* were amended to recognize both registration and possession as benchmarks for determining the validity of Crown secured claims. In the alternative, the *BIA* could be amended to force an unregistered secured creditor in possession of goods to release the goods to the debtor where the debtor can show that the goods are required to enable it to put forward a viable proposal. This approach would be in keeping with the line of case law that recognizes that the promotion of reorganizations is an "underlying fundamental" of the *BIA*.[186] In any event, reform of some kind would be welcome. A large number of Canadian companies are involved with the importation of goods, and it is inevitable that some of these companies will become insolvent each year.

D. Conclusion

For the most part, the *BIA* does not alter the regime for dealing with secured creditors established by the provincial *PPSA*. The *BIA* allows secured creditors to retain their priority and enforcement rights. In fact, the *BIA* in some circumstances serves to enhance the rights of secured creditors. This in turn makes the *BIA* a potentially useful weapon for secured creditors seeking to enforce their security.

X. PENSION AND BENEFITS ISSUES

A. Current Statutory/Regulatory Scheme

There are a number of federal statutes that purport to give pensions and benefits to a variety of segments of Canadian society. These statutes also provide that the pensions and benefits created by the statutes are *not* capable of being assigned or given as security, nor are they subject to seizure and execution. A summary of the relevant legislative and regulatory provisions is provided in Appendix J.

The following statutes create pensions and benefits that are subject to the limitations identified above:

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 65(1) (the CPP does not specifically exempt the benefits from seizure and execution, although it provides that any transaction purporting to assign or grant a security interest in a benefit is void);

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, ss. 14 and 70;

Labour Adjustment Benefits Act, R.S.C. 1985, c. L-1, s. 23 (section 23 also provides that any transaction purporting to assign or give security in a labour adjustment benefit is void, although there is no prohibition against seizure and execution);

Members of Parliament Retiring Allowances Act, R.S.C. 1985, c. M-5, s. 60;

Old Age Security Act, R.S.C. 1985, c. O-9, s. 36(1);

Public Service Superannuation Act, R.S.C. 1985, c. P-36, ss. 10(10) and 58;

Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11, s. 9(7); and

Special Retirement Arrangements Act, 1992, c. 46, s. 22.

The *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.) is the most important piece of federal legislation governing pensions (although it does not create them). This Act governs pension plans that are "organized and administered for the benefit of persons employed in connection with certain federal works, undertakings and businesses".[187] Under section 4(4), the Act applies to a variety of pension plans in a number of industries, including shipping, navigation and railway pensions, pensions for airline employees, pension plans established by banks, and any pension plan created for a "work, undertaking or business that is within the legislative authority of Parliament". Section 36(2) of the Act also voids any agreement to assign or give as security any benefit provided under a pension plan, or any money withdrawn from a pension fund.[188]

The public policy purpose behind provisions that limit a creditor's ability to take security in pensions is to preserve the income base of retired individuals receiving pensions and benefits. Nevertheless, these provisions cause difficulty for secured creditors in that they are unable to obtain security on a valuable asset – the pension or benefit. Often, the pension or benefit may be the most valuable asset possessed by the retired individual. Likewise, lenders may be unwilling to lend to individuals in need of money because the lender will be unable to obtain security for the funds advanced.

B. Garnishment, Attachment or Diversion of Pensions

Under certain circumstances, pension benefits may be garnished or attached. For example, the *Garnishment, Attachment and Pension Diversion Act* (the *"Garnishment Act"*) permits the garnishment or attachment of the Crown and the diversion of pension benefits payable by the Crown.[189] The Schedule to the *Garnishment Act* lists the pension plans which may be diverted under the Act. For example, pension benefits paid under pension plans created by the *Public Service Superannuation Act*, the *Canadian Forces Superannuation Act*, and the *Royal Canadian Mounted Police Superannuation Act*, among others, may be diverted. The *Garnishment Act* also permits the diversion of these pension payments in order to satisfy the payment of financial support orders made pursuant to matrimonial disputes[190].

This "diversion" of the pensions under the *Garnishment Act* is essentially an attachment of, and thus a security interest in, the pensions and benefits created under federal legislation.

1. Division of Pension Benefits Between Spouses

The federal government has enacted legislation that creates a scheme for the division between spouses (or former spouses) of pensions, pension credits, and benefits.[191] Previously, federal legislation failed to provide for a scheme by which pension plan administrators were

required and authorized to divide the pension at source. As a result, plan administrators often failed to honour court orders dividing pension benefits.[192] These failures to satisfy court orders hindered a spouse's (or ex-spouse's) ability to obtain the diversion of the pension and benefits, as ordered by the court. Therefore, under previous legislation, even though a spouse (or ex-spouse) may have been successful in his/her application to divert the pension funds, the administrative branch of the pension fund would not be bound to "cut two cheques at the source" as it were, to pay both the spouse and the respondent. For example, in a case decided by the Saskatchewan Court of Queen's Bench, the Court heard evidence to confirm that "the administrative branch of the *Public Service Superannuation Act* would not honour a judgment dividing a pension benefit at source".[193] Thus, the spouse would be forced to rely upon his or her own efforts to obtain the pension and benefits in order to fulfil the support order. This fact created uncertainty regarding the practical effect of the *Garnishment Act*.

The Courts have employed creative solutions, in an attempt to assist spouses in collecting pensions and benefits. For example, in *Britney v. Britney*, the Court declared the petitioner's right to receive a portion of the pension and benefits a form of "maintenance" in order to ensure that the payments could be subject to garnishment.[194] Unfortunately, there may be problems with viewing pension payments as maintenance.[195] For example, if the petitioner dies before the respondent does, the petitioner's estate may not be able to collect the remainder of the pension payments because maintenance is deemed to terminate upon the death of the petitioner.

In order to resolve these problems, and to provide guidance with respect to the division of pension benefits between spouses, Parliament adopted the *Pension Benefits Division Act* in 1994. This Act applies to a variety of federally administered pensions, including pensions operated under the *Public Service Superannuation Act*, the *Canadian Forces Superannuation Act*, the *Royal Canadian Mounted Police Superannuation Act*, and the *Special Retirement Arrangements Act*, among others. The *Pension Benefits Division Act* describes more specifically the circumstances in which pension benefits can be divided, as well as the procedures to be followed regarding the approval of division, lump sum payments, and the method of division of benefits. This legislation reduces the uncertainty surrounding the division of pension benefits pursuant to court orders and spousal agreements.

2. Receivership and Bankruptcy

The courts have also attempted to appoint a "receiver" to distribute pension entitlements. Unfortunately, the case law is unclear as to whether a receiver can be appointed to garnish a pension.

For example, case law has held that the provisions of the *Public Service Superannuation Act* prohibit the use of an "equitable" solution, such as the appointment of a receiver. In one Ontario Court decision, Justice Rutherford struck out portions of an order obtained in Motions Court that appointed a receiver to act in place of the respondent to permit the petitioner to receive any pension benefits or income tax refund that the respondent might obtain.[196] The Court examined the legislative scheme established under section 10(10) of the *Public Service Superannuation Act*, which exempted a pension or benefit from attachment, seizure and execution either at law *or in equity*. The Court concluded that because the appointment of a receiver was an *equitable* remedy, the legislative scheme did not permit the Court to appoint a receiver in place of the respondent. The appointment of a receiver was seen by the Court as an attempt to act outside of a clear statutory framework provided by Parliament for the diversion of amounts payable by the Crown to judgment debtors. Likewise, the British Columbia Supreme Court declined to appoint a receiver to receive benefits paid to a judgment debtor pursuant to a pension plan registered under the *Pension Benefits Standards Act (B.C.)*.[197] Justice Meredith found that because the provisions in the *Old Age Security Act* and the *Canada Pension Plan* prohibited attachment, assignment, seizure and execution both in law and in equity, the appointment of a receiver would violate these principles. As well, the Court reasoned that seizure of pension payments would likely cause the debtor to apply for welfare, thereby causing the public to indirectly pay the creditor.

In contrast, numerous cases have held that a receiver may lawfully be appointed to receive benefits payable to a debtor from an employer's pension plan. In *Frueh v. Mair*, the Court held that the appointment of a receiver for benefits paid to a debtor by his employer out of his pension plan would *not* offend the *Pension Benefits Standards Act*.[198] In fact, Master Leacock concluded that section 85(1) of the *Civil Enforcement Act (Alberta)* permitted the appointment of a receiver where property of a debtor could not easily be realized. Furthermore, Master Leacock stated that the modern definition of attachment and garnishment

in the context of the *Civil Enforcement Act (Alberta)* did not include the appointment of a receiver. Likewise, the Court in *Re Burton* determined that payments made to a bankrupt under the Canada Pension Plan were available for collection by creditors pursuant to section 68(1) of the *Bankruptcy and Insolvency Act*.[199] In this case, Registrar Ferron concluded that no provision in the *Bankruptcy and Insolvency Act* precluded this form of payment. In *Re Halldorsson*, the Court held that a disability benefit received by a bankrupt from the *Canada Pension Plan* was available for seizure by the bankrupt's creditors.[200]

Case law has failed to maintain a consistent approach with respect to the treatment of pensions upon bankruptcy and whether or not a receiver may be appointed to collect a debtor's (or a former spouse's) pension and benefit payments. The combined application of both federal and provincial legislation often leads to inconsistent court decisions. Any changes to federal legislation should attempt to provide guidance in the application of this legislation to clarify the legal effect.

3. Pension Payments and the Bankruptcy and Insolvency Act

One additional issue relating to bankruptcy and pensions is whether or not pension payments are given a place in line for the bankruptcy scheme set out in the *Bankruptcy and Insolvency Act* (the "BIA"). Section 136(1)(d) of the BIA states the following:

136.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars...[together with disbursements and commissions].

Specifically, the issue is whether pension payments can be classified as "wages, salaries, commissions or compensation", thus allowing employees to bring a claim for these payments in the event of the bankruptcy of their employer.

Case law has considered this question. In *Abraham v. Canadian Admiral Corp. (Receiver of)* [201] employees sought vacation pay and pension payments from their bankrupt employer. At trial, Wilson J. found that:

Because of the unique and complex nature of pension benefits [being amounts owing as contributions by an employer to a plan], I would find that they do not fit within the intended scope of the definition of "wages, salaries, commission or compensation" owed to employees, as defined by s. 107(1)(d) [now 136(1)(d) of the *Bankruptcy and Insolvency Act*].[202]

Wilson J. further acknowledged that as the employees had a lien on the bankrupt's assets, they could proceed with a claim as secured creditors.[203] Thus, although this case was decisive at trial in its finding with respect to section 136(1)(d) of BIA, the Court of Appeal was not as decisive. Indeed, McKinlay J.A. and Finlayson J.A. stated that the trial judge was correct in her decision that the claim for vacation pay was a preferred one in bankruptcy and that the pension one was not. Nevertheless, the Court of Appeal refused to comment on whether or not Wilson J.'s characterization of the pension payments was correct and commented instead that:

The trial judge was of the view that since the pension claim was not dealt with in the detailed portion of s. 107 [of the *Bankruptcy Act*], that claim retained the character it held in a non-bankruptcy situation - that of a secured creditor. Whether or not that decision is correct, it does not affect the rights of the appellant in this case.[204]

Thus, although the Court of Appeal did not specifically address the issue, Wilson J.'s statement on the issue remains persuasive. Indeed, further support for Wilson J.'s decision is found in the case of *Neal v. Toronto-Dominion Bank* at the Ontario Court General Division. In this case, MacPherson J. cited Wilson J.'s decision and stated: "I agree with the observations of Wilson J. in *Abraham v. Coopers and Lybrand Ltd.*"[205] Thus, it appears that pension payments are not considered to be wages, salaries, commissions or compensation in the

context of section 136(1)(d) of the BIA. Thus, while employees are not entitled to a preferred claim in bankruptcy with respect to pension contributions, they may in fact have a secured claim where conferred by statute. Because the statutory lien is in favour of employees, the provisions of sections 86 and 87 of the *Bankruptcy and Insolvency Act* do not apply in a bankruptcy.

C. Canada Pension Plan, Old Age Security

Both the *Canada Pension Plan* and the *Old Age Security Act* state that a benefit shall not be assigned, charged, attached, anticipate or given as security. Both Acts also provide that any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void. Benefits are also exempt from seizure or execution, either at law or in equity.[206] Section 65.1 of the *Canada Pension Plan* allows for one exception to this rule – an individual is permitted to assign his or her benefits to a spouse. Section 65.1 further describes the form of spousal agreement that is binding upon the Minister.

Case law has confirmed that benefits available under the *Canada Pension Plan* and the *Old Age Security Act* are not available for garnishment by a creditor.[207] One exception to this rule, however, is that Revenue Canada is permitted to garnish payments made under the *Canada Pension Plan* for payment of income tax arrears.[208] The courts have held that, where a person owes money to the Crown, section 224.1 of the *Income Tax Act* permits the Minister to retain benefit payments by way of deduction or "set-off". According to the courts, "set-off" is not equivalent to "attachment", and thus the prohibition on attachment under section 65(1) of the *Canada Pension Plan* does not prevent the Minister from seizing benefit payments.[209]

D. Conclusion

With few exceptions, legislation provides, and case law has confirmed, that pensions and benefits are unavailable as security to creditors. This in turn affects whether or not pension contributions of an employer or debtor may take priority over security held by a secured creditor. Generally speaking, few creditors attempt to obtain security over pension benefits, simply because the law prohibits this form of security. Nevertheless, the legislative scheme surrounding pension payments could be further clarified by specifying whether or not a receiver may be appointed to receive pension benefits. Jurisdictions across Canada have often produced conflicting results. Clarifying this issue would avoid the confusion surrounding the use of receivership as a method by which a creditor may obtain pension benefits.

XI. MISCELLANEOUS ISSUES

In addition to the various statutes examined above, there are several federal statutes that impact on security interests in certain specific contexts. These contexts include where a corporation issues debt obligations that are available to the public and where the government expropriates an interest that is subject to a security interest. A brief overview of some of these provisions is provided below and in Appendix K.

A. The *Canada Business Corporations Act*

Sections 82-93 of the *Canada Business Corporations Act* (the "*CBCA*")[210] lay down rules for trustees appointed as trustee under the terms of a trust indenture to which a corporation is a party. As trust indentures involve the issuing of debt obligations and often the creation of security interests, these sections impact on security interests. Sections 82-93 apply to a trust indenture only if the debt obligations issued or to be issued under the trust indenture are part of a distribution to the public.

Section 86(1) has the most direct impact on security interests. Section 86(1) requires issuers and guarantors of debt obligations issued under a trust indenture to furnish the trustee with evidence of compliance with the conditions in the trust indenture relating to the release or release and substitution of property subject to a security interest constituted by the trust indenture. Section 90 is also of interest, as it requires trustees to give notice to holders of debt obligations issued under a trust indenture notice of every default arising under the trust indenture within thirty days of the default having arisen. Finally, s. 85(1) gives holders of debt obligations issued under a trust indenture the right to require the trustee to furnish a list setting

out the names and addresses of the holders of the debt obligations, the principal amount of outstanding debt obligations owned by each holder and the aggregate principal amount of debt obligations outstanding.

Sections 82-93 of the *CBCA* ensures that corporations issuing debt obligations which effect a security interest will (i) be subject to certain obligations with respect to providing information and (ii) will have a trustee who is obliged to monitor the corporation's compliance with the conditions of the debt obligation.

B. The *Canada Cooperatives Act*

Sections 267 to 277 of the *Canada Cooperatives Act* (the "*CCA*")[211] mirror the provisions contained in ss. 92-93 of the *CBCA*. Again, these sections are designed to ensure that there is an appropriate level of accountability and monitoring with respect to corporations whose debt obligations are made available to the public.

C. The *Canada Corporations Act*

Section 68 of the *Canada Corporations Act*[212] is similar to ss. 82-93 of the *CBCA* and ss. 267-277 of the *CCA* in that it is designed to create some level of monitoring of debt obligations created by corporations. Section 68 of the *Canada Corporations Act* requires corporations to deliver to the Minister particulars in respect of certain kinds of charges. These include charges for the purpose of securing an issue of debentures, charges on the uncalled share capital of the company and charges on the goodwill or intellectual property of the company. The particulars to be delivered to the Minister are the total amount secured by the whole series, the date of the covering deed, if any, and a general description of the property charged and the names of the trustees, if any, for the debenture holders. The Minister upon payment of the prescribed fee enters these particulars in a register.

D. The *Expropriation Act*

Section 26(10) of the *Expropriation Act*[213] provides a formula for determining the value of expropriated land that is subject to a security interest. Section 33(2) of the *Expropriation Act* ensures that payments made pursuant to s. 26(10) will be deemed to discharge any liability, under the terms of the security, of the owner of the interest subject to the security interest, to the extent of the compensation so agreed or adjudged to be payable. Sections 26 and 33 of the *Expropriation Act* are designed to ensure that secured creditors - to the extent possible - will recover the same value on their security as they would absent any expropriation.

E. Conclusion

The above-mentioned statutes do not have a major impact on security interests. They are, however, of interest to large corporations who issue debt obligations made available to the public and in situations where the government expropriates interests subject to a security interest.

PART THREE: POLICY AND CONCLUSION

I. OBJECTIVES OF THE CURRENT FEDERAL PERSONAL PROPERTY SECURITY REGIME

Diversity is inherent in Canada's personal property security regime. Most of the provinces have adopted similar, yet different, personal property security legislation, and Quebec is unique among Canadian personal property law in its application of the Civil Code. These systems all operate under the umbrella of related personal property provisions in the federal statutes discussed in this paper. The challenge is unifying the diversity of personal property security practice, and "filling the gaps" in situations where neither the provincial, nor federal statutes provide clear and concise guidance. As discussed in detail above, the current federal systems offer no consistency in approach and the registration system is not as developed or searchable as most provincial systems. Furthermore, the effect of registration on priorities and other key considerations is unclear, especially in those circumstances where the federal and provincial regimes overlap or intersect. Any unified federal security system must seek to

remedy these deficiencies, while at the same time accommodating future changes to the business environment.

A. What are the statutory objectives underlying the above-mentioned provisions?

As we have discussed, the statutory objectives surrounding the previously discussed federal statutes are very specific to the purposes of each statute. Federal statutes impacting on personal property can be divided into two types: those which create registration and priority regimes, and those which do not.

Generally speaking, both types of federal legislation fulfill statute-specific objectives. The *Bank Act* and the various federal IP statutes are examples of federal statutes which create federal registration and prioritization regimes. In the case of *Bank Act* security, personal property security provisions were developed in order to ensure that Banks were effectively secured for the large amounts of money loaned by Banks, and to maintain federal jurisdiction over all aspects of the banking industry. Likewise, security interest provisions were enacted in the IP statutes in order to maintain the federal government's constitutional jurisdiction over patents and copyrights.

Other statutes provide examples of federal statutes which do not create registration regimes, yet nevertheless have an impact on federal security interests. For example, provisions in the *Indian Act* that limit the ability to take security in the property of Indians are intended to maintain the special property status of Indians created by the Act. Likewise, statutory provisions relating to personal property security in pensions and benefits were created to maintain income bases for retired individuals, and to achieve important social objectives. Federal statutes impacting on security interests in the agricultural sector were designed to protect what has traditionally been seen as a key component of Canada's economic and historical makeup - the family farm. The primary function of these agricultural statutes is to provide a process whereby farmers in financial difficulty are insulated from the normal enforcement measures available to creditors under provincial personal property security regimes.

To date, the government objective has not been the creation of a complete and all encompassing federal security interest regime. The reason for this can be easily understood, given the complexity and variation of legislative areas which such a regime would attempt to govern.

B. Are these objectives fulfilled by the current federal personal property security regime?

In certain areas, particularly where the impact on security interests is minor or incidental, it can be argued that the federal statutes affecting security interests adequately fulfill their objectives. For example, the modest goal of providing farmers facing financial difficulty with some extra time before their creditors can enforce their security is achieved by the *Farm Debt Mediation Act*. This goal may be described as "modest" in the context of security interests, as it does not involve a registration component and does not impact on the key areas of priority and perfection. Section 244 of the *BIA* achieves a similar goal of providing debtors with some additional time to organize their affairs before creditors can enforce their security. Likewise, the provisions under the pensions and benefits statutes also adequately fulfil their objective – the preservation of an income base for retired or pension-dependent individuals.

The federal statutes are somewhat less effective where they purport to establish a workable, clear and efficient mechanism for the registration, perfection and priority of security interests. These statutes tend to create problems of duplication and uncertainty, in particular where there is an overlap between federal and provincial statutes which impact on the relevant legislative area. These problems are particularly evident with the federal IP statutes and the *Bank Act*.

In the case of the IP sections dealing with registering "transfers" and "assignments", neither their purpose nor their effect is clear. The term "transfer" is not defined, and it is thus unclear whether creating a security interest would constitute a "transfer". The resulting confusion leads most lenders to register security interests in intellectual property under both the provincial and federal statute. The security provisions in the *Bank Act* produce a similar duplication, with banks taking both a *Bank Act* security interest and a *PPSA* security interest in the same collateral to secure the same obligation. This is further complicated since the priority as

between a *Bank Act* and *PPSA* registration is not clear. Other problems with the *Bank Act* security provisions include their limited scope, their lack of a comprehensive priority system and their lack of a comprehensive enforcement procedure. Given these weaknesses and uncertainties, it is arguable that the objective of ensuring that banks are adequately able to take security for the money they lend could be better served by either revising the *Bank Act* to modernize and expand the security provisions, or by repealing the provisions and allowing security interests taken by banks to be governed by provincial *PPSA* legislation. A similar argument can be made with respect to the registration provisions found in the federal IP statutes and other federal legislation which purport to establish a structured system for the registration and prioritization of security interests.

C. Should the current federal personal property security regime strive to fulfill other objectives in light of modern commercial practices?

Issues involving secured lending have become immensely more complex and important since the time the security and registration provisions in the *Bank Act* and federal IP statutes and other similar legislation were developed. The creation of detailed and thorough provincial *PPSA* legislation and the case law surrounding it is a reflection of this. The presence of the *PPSA* suggests that, where federal objectives and provisions collide with those of the *PPSA*, the federal provisions might be redundant. In other words, the *Bank Act* objective of ensuring that bank loans are secured may already be accomplished by the *PPSA*. This is especially true now that the majority of Canadian provinces have adopted comprehensive personal property security legislation with similar conflict of law arrangements. Similarly, registering a security interest in IP with the CIPO adds little in terms of accomplishing the lender's usual objective of achieving certainty with respect to priority and perfection. If the objective of the IP sections was different - if, for example, the federal government set out to create an "IP security interest" designed to solve some of the problems associated with taking and giving security in IP - the presence of the sections might be justified.

One major problem with the current federal personal property security interest regime is its lack of certainty and efficiency. In many cases, federal registration systems are inadequate and difficult to use or search. In other cases, the security regime established under federal statutes conflicts with provincial security legislation, and priorities are difficult to predict. Any changes to the current federal personal property security regime must strive to create certainty and efficiency in the system.

D. Considerations for future reform

As previously discussed, many problems discussed with federal security provisions identified above would likely be solved by individual legislative additions to the applicable statute. Unfortunately, however, as previously discussed, the current state of affairs does not lend itself to a consistent approach. [214]

Reform of the current federal security interest regime must be undertaken, but critics are divided on the proper course to take.

1. Abolition of certain federal security interest regimes

Some critics advocate the complete abolition of certain federal security interest regimes. For example, critics have suggested deleting the security interest provisions of the *Bank Act*, which introduce layers of complexity and costs for all parties concerned. [215] Likewise, commentators have criticized the registration scheme for railways and rolling stock, established by the *Canada Transportation Act*, as outdated and cumbersome. Prior to the existence of provincial personal property legislation, this registration scheme provided a useful registration service. Today, however, this scheme creates uncertainty in the taking of security of railways and rolling stock, and could therefore be abolished.

2. Unified Federal Personal Property Security Act

Other commentators have proposed key factors to be considered, prior to the wholesale unification of all federal security interest provisions under the guise of one single federal personal property security statute. Roderick J. Wood proposes several key concerns which

must be examined prior to the creation of any unifying statute:[216]

a. Will the federal security system provide a comprehensive code? If not, thought must be given as to what law would be used to supplement the federal statute.

b. Will the federal system be the exclusive means by which a security interest would be taken, and to what extent would provincial law play a part?

c. If the federal security system is not to be exclusive, will a secured party be able to hold security in the property at both federal and provincial levels? If this is the case, thought must be given as to whether the parties could elect between federal and provincial law, and whether a single security document could give rise to security under both the federal and provincial systems.

d. A method of registration must be created – either a centralized federal registry, or a registry on regional bases. It must also be determined to what extent the provincial registries would be utilized.

e. If the federal security system is *not* exclusive, what method will be used by which priorities will be determined when a provincial security interest conflicts with a federal security interest?

f. To what extent can the law of civil and common law be harmonized and incorporated into the federal system, and to what extent may provincial law be harmonized with federal legislation?

In order to make effective and efficient changes to the federal security interest regime, an analysis of the provincial personal property security regimes must also be made. Additional consideration must be given as to whether the existing provincial personal property security regimes adequately address the federal objectives of certainty and efficiency. As well, it must be examined whether the existing federal regime undermines the certainty of the provincial regimes. It must also be considered whether federal legislation is able to adequately address concerns (such as the taking of collateral on a nation-wide basis) that could not be fully or adequately addressed by provincial personal property regimes. These factors are important considerations for the creation of a unified federal security interest regime.

II. OPTIONS AVAILABLE TO THE FEDERAL GOVERNMENT

There are several options the federal government may pursue in an attempt to solve existing problems with the current federal security interest regime. As discussed above, the government may choose to modify the security interest provisions of each individual federal statute. Alternatively, the government could suspend a select few problematic security provisions such as the relevant provisions of the *Bank Act*. Thirdly, in an attempt to unify all federal security interest provisions, the government could enact comprehensive federal personal property security legislation.

A. Evaluation of the various options

A review of all relevant federal security interest provisions suggests that it may be difficult to find an underlying objective sufficient to unify all the systems under the umbrella of a single federal personal property statute. As examined in this paper, certain changes to individual security systems may be sufficient to compensate for existing deficiencies. The implementation of a unified federal personal property security act would produce a massive change to the existing federal security interest system and, as might be expected, may produce further complications and adjustments. To be worth the effort, any unified federal personal property security act must effectively resolve the majority of the outstanding issues with the current federal security interest regime. This comprehensive regime must be a workable, manageable system, and provincial co-operation would likely be required in order to ensure its success. The suspension of currently problematic security interest provisions may provide a satisfactory solution that focuses on those legislative areas where reform is most needed.

Regardless of the method eventually used to remedy any deficiencies, the current federal security interest regime is clearly in need of modification and reform. In the end, the approach

employed must strive to fulfil the purpose behind personal property security legislation – predictable and certain commercial transactions.

APPENDIX A

Summary of legislative and regulatory provisions

relating to Banks and other financial institutions

Atlantic Canada Opportunities Agency Loan Insurance Regulations, SOR/90-289, ss. 5(1)(f).

This regulation enables the Atlantic Canada Opportunities Agency to provide loan insurance to certain individuals and businesses. Pursuant to s. 5(1)(f), one of the criteria that must be satisfied is that "the lender acquires enforceable security for the repayment of the loan by way of a security interest in a form that is consistent with standard banking practice".

The regulations also provide a procedure to be followed to recover the debt from the Crown in the event of default by the borrower. Under s. 10, the financial institution must begin by making a formal demand to the applicant and take all reasonable steps to protect its rights and realize on the security. Once this is done, the lender can make a claim under the loan insurance agreement. Pursuant to section 11, this claim must contain "all of the information that is required by the Agency in order to determine the amount that is payable". The maximum amount payable by the Agency to a lender in respect of a claim is defined in subsection 12(1).

Bank Act, 1991, c. 46, s. 369, 419, 425-439, 473, 552, 627, etc.

Section 369 outlines the order of priority in the event that a bank becomes insolvent. (Section 627 is identical except that it applies to authorized foreign banks.) Section 419 stipulates that a bank shall not create a security interest in any property of the bank to secure an obligation of the bank, unless the obligation is to the Bank of Canada or the Canada Deposit Insurance Corporation or the Superintendent has approved in writing the creation of the security interest. (Section 552 is identical except that it applies to authorized foreign banks.) Section 473 states that a bank may acquire an investment in a body corporate, an interest in an unincorporated entity, or an interest in real property, if the investment or interest is acquired through the realization of a security interest held by the bank.

Aside from the above-noted provisions, sections 425 to 439 are the main provisions of the Act dealing with security interests. These provisions are the most comprehensive of the federal statutes governing personal property security interests. Section 427(4) creates a notice filing system where, instead of registering the security document, a bank can register a document called a notice of intention in the Bank of Canada registry. The latter registry is created under section 427(6). The Act also permits, at section 427(2)(b), the granting of a fixed security interest in collateral which is automatically attached to the debtor's after-acquired property (but which does not carry the inferior priority status of an equitable interest or the complexities of a floating charge).

Business Development Bank of Canada Act, 1995, c. 28, s. 15(1).

Section 15 enables the Business Development Bank of Canada to acquire, hold, assign and realize on a "security interest of any kind". Pursuant to s. 15(2), the Bank can also acquire and hold a warehouse receipt or bill of lading as security, or take security on goods, wares and merchandise "in the same form and manner as security on such property may be taken by a bank under section 427 of the Bank Act".

Canada Deposit Insurance Corporation Act, R.S.C. 1985, c. C-3, s. 10(1), 39.13 and 39.15(6).

Section 10 of the Act enables the CDIC to "make or guarantee loans or advances, with or without security" to a financial institution for the purpose of reducing a risk to the CDIC or reducing or averting a threatened loss to the CDIC. Section 39.13(3) empowers the Governor in Council to appoint CDIC as receiver of an insolvent federal financial institution. As a receiver, CDIC can take possession and dispose of the assets of the financial institution. Section 39.15 imposes strict limitations upon the rights of other creditors if the Governor in Council exercises his powers under section 39.13.

Canada Mortgage and Housing Corporation Act, R.S.C. 1985, c. C-7, s. 27-28.

Section 27 empowers CMHC to "acquire, hold and dispose of collateral security for the repayment of loans or the payment of debentures, other evidences of indebtedness, guaranteed investment receipts or guaranteed investment certificates, made or purchased by the Corporation". Section 28 also enables CMHC to "protect its security in respect of any indebtedness to it, make loans to the debtor and take such other measures and steps as may be required in accordance with normal mortgage practice to safeguard the interests of [CMHC]".

Canada Small Business Financing Act, 1998, c. 36, s. 4-5 and *Canada Small Business Financing Regulations*, SOR/99-141, s. 13-14.

Section 5 of *the Canada Small Business Financing Act* states that the Minister is liable to pay to a lender a specified percentage of a loss sustained by it as a result of a loan, provided that the requirements of the CSBFA and the Regulations have been met. The Regulations outline the specific procedures and conditions in the granting and administering of Canada Small Business Financing loans and in the submission and substantiation of claims for loss for loans made after March 31, 1999.

Pursuant to section 8 of the Regulations, lenders are expected to make loans under the CSBFA with the same care as in the conduct of their ordinary business. More specifically, section 8 states that before making a loan, a lender must (a) obtain credit references or conduct a credit check on the borrower; and (b) complete an assessment of the repayment ability of the borrower, taking into account all other financial obligations of the borrower. In addition, section 14 states that a lender providing certain types of loans under the CSBFA must "take valid and enforceable first-ranking security in the assets of the small business whose purchase or improvement is to be financed by the loan". Section 13 states that the borrower must pay the cost incurred by the lender for taking such securities.

Canada Student Loans Act, R.S.C. 1985, c. S-23, s. 7 and 19 and *Canada Student Loans Regulations*, SOR/93-392, s. 29-32.

Section 7 states that the Minister may be held liable to pay to a lender the amount of any loss sustained by it as a result of a loan made to a qualifying student provided that certain conditions are satisfied. Section 19 provides that a guaranteed student loan made by a lender to a borrower not of full age, and interest thereon other than interest payable under section 6, is recoverable by the lender from the borrower as though the borrower had been of full age at the time the loan was made. Section 29 of the Regulations states that where the Minister makes a payment to a lender pursuant to section 7 of the Act in respect of any guaranteed student loan, the lender shall, on behalf of Her Majesty, take such reasonable steps as the Minister may require to collect due payments of principal and interest, to realize on any security and to otherwise effect collection of the loan. Sections 30-32 of the Regulations provide that where the Minister pays to a lender the amount of loss sustained by the lender as a result of a guaranteed student loan, Her Majesty is subrogated in and to all the rights of the lender in respect of the guaranteed student loan.

Canadian Payments Association Act, R.S.C. 1985, c. C-21, s. 17 and 31.

Section 17 empowers the Canadian Payments Association to mortgage, pledge or otherwise create a security interest in all or any property of the Association owned or subsequently acquired, to secure any obligation of the Association. The terms "debt obligation" and "security interest" are defined in subsection 17(3). Section 31 provides that where a receiving order or a winding-up order is made against a member of the Association, any claim with respect to certain types of property will be paid from the estate of the insolvent member in priority over any other claims.

Cooperative Credit Associations Act, 1991, c. 48, s. 2, 353, 383, 386, 395, 397, 475, etc.

Section 2 defines "security interest". Section 353 gives an order of priority to be followed in the event of the insolvency of a cooperative credit association. Section 383 limits the power of associations to take security interests in any property of the association to secure an obligation of the association. Section 395 states that notwithstanding anything in this Act, an association may acquire an investment in a body corporate, an interest in an unincorporated entity, or an interest in real property, if the investment or interest is acquired through the realization of a

security interest held by the association. Section 475 states that a central cooperative credit society may create a security interest in any of its property to secure an obligation to an association of which the central is a member or to a deposit protection agency, or the government of the province in which the central is incorporated, if the agency or government is designated by the Minister.

Export Development Act, R.S.C. 1985, c. E-20, s. 10(1.1)(d) and 10(6).

Subsection 10(1.1)(d) states that the EDC, in performing its duties under the Act, is empowered to "take any security interest in any property". Subsection 10(6) provides that the Governor in Council may make regulations governing the acquisition by the Corporation of any interest, other than a security interest or an interest resulting from the realization of a security interest, in any entity.

Fisheries Improvement Loans Act, R.S.C. 1985, c. F-22, s. 10 and *Fisheries Improvement Loans Regulations*, C.R.C., c. 864, s. 19 and 22-24.

Subsection 10(1) identifies the types of security interests that may be taken by a bank which makes a loan guaranteed by the Minister in respect of which it is required by regulation to take security on real or personal property. Subsection 10(2) states that a bank may exercise, in respect of any mortgage, hypothec or assignment taken under the Act and the real or personal property affected thereby, all rights and powers that it would have or might exercise if the mortgage, hypothec or assignment had been taken by the bank by way of subsequent security under the Bank Act. Section 19 of the Regulations identifies the circumstances under which a security may be taken under the *Fisheries Improvement Loans Act* and the types of security that may be taken. Sections 22-24 of the Regulations outline the procedure to be followed by a lender upon default by the borrower.

Insurance Companies Act, 1991, c. 47, s. 470, 500, 542.07 and 559.

Section 470 states that a company shall not create a security interest in any property of the company to secure an obligation of the company, unless the security interest is created in relation to the reinsurance by the company of risks insured by another insurer or the Superintendent has approved in writing the creation of the security interest. (Section 542.07 is identical, but relates to fraternal benefits society.) Section 500 enables a company to acquire an investment in a body corporate, an interest in an unincorporated entity, or an interest in real property if the investment or interest is acquired through the realization of a security interest held by the company. (Section 559 is identical, but relates to fraternal benefits society.)

Trust and Loan Companies Act, 1991, c. 45, s. 374, 419 and 458.

Section 374 outlines the order of priority in the event that a trust or loan company becomes insolvent. Section 419 provides that such a company shall not create a security interest in any property of the company to secure an obligation of the company, unless the obligation is to the Bank of Canada or the Canada Deposit Insurance Corporation or the Superintendent has approved in writing the creation of the security interest. Section 458 states that a trust and loan company may acquire an investment in a body corporate, an interest in an unincorporated entity, or an interest in real property, if the investment or interest is acquired through the realization of a security interest held by the company.

APPENDIX B

Summary of legislative and regulatory provisions

relating to railways and rolling stocks

Canada Transportation Act, 1996, c. 10, s. 104-106.

Section 104 provides that any mortgage, hypothec or assignment issued by a railway company must be deposited in the office of the Registrar General of Canada and notice is to be published without delay. Furthermore, there is no requirement that the security be deposited or notice be given under any other statute respecting real or personal property. Section 106

provides that insolvent railway companies may file a scheme of arrangement with the Federal Court and the Court may restrain any action against the company that the Court considers appropriate. Security interests are unaffected by any order of the Court, unless within 60 days of the filing of the arrangement, the railway company agrees to perform all of its obligations under the security arrangement or any default is cured.

CN Commercialization Act, 1995, c. 24, s.12.

This provision permits the Minister, with the approval of the Minister of Finance, to enter into an agreement with CN or any other person respecting the management of any debt, obligation incurred by, or security interest in CN. Furthermore, the Minister is authorized to enter into any arrangement to dispose of or manage CN's shares, as well as to pay out of the Consolidated Revenue Fund, or out of any other proceeds of any security interests in CN, amounts relating to the management of CN's security interests.

APPENDIX C

Summary of legislative and regulatory provisions

relating to Agricultural and Agri-Food enterprises

Advance Payment for Crops Act, R.S.C. 1985, c. C-49, ss. 5-6.

Sections 5 and 6 provide that for the Minister to make an effective guarantee under the Act, the producer organization must meet a number of criteria, including: signing a written agreement with the producer under which the producer agrees to repay the advance; agreeing to terms in event of default; and arranging liability where crop has been damaged. As well, where the Minister has given a guarantee, the producer organization has a lien on the crop in respect of which the advance was made.

Agricultural Marketing Programs Act, 1997, c.20, s. 12.

Section 12 provides that an administrator who makes a guaranteed advance to a producer has a security interest in the crop for which the advance was made, and in any crop subsequently grown by the producer, for the amount of the producer's liability under sections 22 and 23.

Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.), ss. 12 (c) and 38(c).

Section 12(c) provides that any association established by the Act may mortgage or create any security interest in, all or any property of the association to secure any obligation of the association. As well, the Act permits the Canadian Livestock Records Corporation to mortgage, or create any security interests in, all or any property of the Corporation to secure any of the Corporation's obligations.

Canada Grain Act, R.S.C. 1985, c. G-10, s. 45, 46, 48, 49, 95 and 116.

Section 45 of the Act permits the Commission to fix security to a person who proposes to operate an elevator, act as a grain dealer, or operate a terminal. Failure to give satisfactory security is a ground for refusal by the Commission to issue an elevator license or a grain dealer's license. Section 49 gives the Commission power to require the licensee to give further additional security. As well, only the Commission or a license holder who has suffered loss or damage may realize or enforce security pursuant to section 45. Furthermore, a failure to give additional security as required by an order obtained under section 49 may be cause for revocation of the elevator or grain dealer's license. Section 116 empowers the Commission to make regulations respecting the security to be given by applicants for licenses and by licensees.

Farm Credit Corporation Act, 1993, c. 14, s. 4(2).

Section 4(2) of the Act permits the Farm Credit Corporation to acquire and hold security interests of any kind and in any form for loans made, guarantees given, or agreements entered

into, as well as to acquire security interests by judicial proceedings and to exchange, lease, sell or dispose of those interests.

Farm Debt Mediation Act, 1997, c. 21, ss. 2, 5, 6, 9, 13, 14, 16, 21, 22.

Section 2 defines a "secured creditor" as anyone holding a mortgage, charge, hypothec or other secured interest against the property of a farmer. Section 5 enables an insolvent farmer to apply to an administrator for either a stay of proceedings against the farmer by all the farmer's creditors, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement. Section 21 requires every secured creditor who intends to enforce any remedy against the property of a farmer, or commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer to give the farmer written notice of the creditor's intention to do so.

Section 5 provides that a farmer may apply for a stay of proceedings against the farmer by all the farmer's creditors or for a review of the farmer's financial affairs.

Section 6 provides that in order to make an application under s. 5, the farmer must be insolvent.

Section 9 directs the administrator to undertake a detailed review of the farmer's financial affairs.

Section 13 provides that the stay of proceedings mentioned in s. 5 can be extended for a maximum of three further periods of thirty days.

Section 14 gives the administrator discretion to end the stay of proceedings where the administrator is of the opinion that the farmer has, by any act or omission, jeopardized his or her assets or obstructed the guardian in the performance of the guardian's duties.

Section 16 provides that where a stay of proceedings is issued a guardian is to be appointed to watch over the farmer's assets.

Section 21 requires secured creditors who intend to enforce their security to provide the farmer written notice of their intent to do so.

Section 22 provides that any act done by a creditor in contravention of s. 21 is null and void.

Farm Improvement and Marketing Cooperatives Loans Act, 1985, c. 25 (3rd Supp.), s. 4.

Section 4 provides that the Minister is liable to pay to a lender ninety-five percent of any loss it sustains as a result of a loan made to a farmer for, among other things, the purchase of tools, livestock and additional land.

Farm Improvement and Marketing Cooperatives Loans and Fees Regulations, 1998, SOR/99-122, s. 15.

Section 15 of the Regulations permit a lender to take security in any of the following ways: under s. 427 of the *Bank Act*, by registering the security with personal property legislation in each province; by commercial pledge; by a mortgage or hypothec on property and by the assignment of rights or interest of the borrower under an agreement for sale.

Farm Improvement Loans Act, R.S.C. 1985, c. F-3, s. 10.

Section 10 of the Act enables the Bank to take a mortgage or hypothec on a farm, as well as an assignment of the rights and interests of a purchaser of a farm, as security for a guaranteed farm improvement loan. Section 10(2) also provides that the Bank's security is equivalent to

security taken under the Bank Act.

Farm Product Agencies Act, s. 22(1) and 42(1).

Sections 22(1) and 42(1) permit an agency established under the Act to purchase, lease or otherwise acquire and hold, pledge, mortgage, hypothecate, sell or otherwise deal with any real property.

Licensing and Arbitration Regulations, SOR/84-432, s. 9-11.

Sections 9 to 11 permit the Minister to require a dealer to provide security as a guarantee that the dealer will comply with the terms and conditions of any license issued pursuant to the Regulations. Failure to provide security may be cause for a dealer to lose the license and forfeiture of security previously provided may occur.

APPENDIX D

Summary of legislative and regulatory provisions

relating to intellectual property

Copyright Act, R.S.C. 1985, c. C-42, s. 57.

Section 57 permits the registration of an assignment of copyright, or a licence granting an interest in a copyright. Any such assignment or grant of interest must be registered in accordance with the Act in order to be opposable against a subsequent assignee for value and without notice.

Patent Act, R.S.C. 1985, c. P-4, ss. 49-51.

Sections 49 and 50 provide for the assignment of patentable inventions, patent applications and patents as long as they are expressed by an instrument in writing. Registering assignments of patents is important, as section 51 states that assignments not registered in accordance with the Act are void against subsequent assignees who have obtained the patent without notice and who subsequently register their assignment.

Trade Marks Act, R.S.C. 1985, c. T-13, s. 26.

Section 26(2)(c) allows notice of a security agreement to be recorded in the trade-mark register, but does not purport to give any kind of priority to those giving such notice.

APPENDIX E

Summary of legislative and regulatory provisions

relating to federal property

Federal Real Property Act, 1991, c. 50, s. 16.

Subsection 16(1) empowers the Governor in Council, on the recommendation of the Treasury Board to authorize the sale, purchase, lease or other disposition of any real property. Under paragraph 16(1)(k), the Governor in Council is also entitled to authorize the acceptance or the release or discharge, in whole or in part, on behalf of Her Majesty, of any security, by way of mortgage or otherwise, in connection with any transaction authorized under this Act. Under paragraph 16(2)(h), the Governor in Council can also make regulations regarding the acceptance or the release or discharge of such security interests.

Financial Administration Act, R.S.C. 1985, Chap. F-11, ss. 66-70; ss. 72-75.

Paragraph 66 defines Crown debt while paragraph 67 provides that, except as specified under the FAA (and any other act) Crown debt is not assignable, nor is any transaction purporting to assign Crown debt enforceable. Under paragraph 68, assignments of Crown debt must comply with notice and technical requirements in order to be effective and valid. Paragraph 69 sets out the steps to provide proper notice to the Crown. Paragraphs 72 to 75 provide that where an amount is due under a payment bond to the Crown, a person who performed the labour or services, qualifies as a class of persons for which the payment bond is held as security, and has not been paid, is deemed (with or without notice) to be an assignee of the right of the Crown to recover an amount under the payment bond.

Assignment of Crown Debt Regulations, C.R.C. c. 675.

These regulations provide more specifically for the procedures surrounding the assignment of Crown debt, including requirements relating to corporations, partnerships and individuals.

APPENDIX F

Summary of legislative and regulatory provisions

relating to Indians and lands reserved to Indians

Indian Act, R.S.C. 1985, c. I-5, s. 21, s. 55, s. 64(1)(h) and 89.

Paragraph 64(1)(h) empowers the Minister to authorize the making of loans to members of the band from the capital moneys of the band for the purpose of promoting the welfare of the band. Such loans must not exceed one-half of the total value of the chattels owned by the borrower and the land with respect to which he holds or is eligible to receive a Certificate of Possession. According to this provision, the Minister is entitled to charge interest and take security for such a loan.

Subsection 89(1) states that the real and personal property of an Indian or a band situated on a reserve "is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band". Subsections 89(1.1) and 89(2) provide two exceptions to this general rule: leasehold interests in designated lands and agreements whereby the right of property or right of possession thereto remains wholly or in part in the seller.

Section 55 of the Act establishes a land registration system, the "Surrendered and Designated Lands Register", whereby the registration of any "instrument that grants or claims a right, interest or charge in, or transfers, encumbers or affects Indian reserve, designated or surrendered lands" is effected. As well, section 21 of the Act establishes a "Reserve Register" by which certificates of possession or allotments to individual natives are registered.

Section 28 provides that any attempt to permit an individual, other than a band member to occupy or use a reserve land or to exercise any rights on that reserve land (by deed, lease, contract, document or agreement) is void. Section 28(2) permits the Minister to grant an exception (for a period of one year) for a non-band individual to occupy or use reserve land, or to exercise any interest in the reserve land.

Section 58(3) provides that the Minister may lease for the benefit of any Indian (on the Indian's application), the land of which the Indian is lawfully in possession.

First Nations Land Management Act, S.C. 1999, Ch. 24, s. 20(1)(a)(b), and 25(3).

The relevant paragraphs of this Act permit the development of a comprehensive First Nations land code by each of the signatory First Nations. Paragraphs 20(1)(a) and (b) grant the First Nations power to enact laws in relation to interests in and licenses of first nation land. Paragraph 25 of the Act enables the Governor in Council to create a First Nations Land Register system, similar to that created under the *Indian Act*.

APPENDIX G

Summary of legislative and regulatory provisions

relating to non-consensual security interests

Excise Tax Act, R.S.C. 1985, c. E-15. ss. 314 and 317.

Section 314 allows the Minister to take security for amounts payable under the Act. A detailed scheme is not provided, the section simply stating that the Minister can take security when the Minister considers it advisable and in an amount and form satisfactory to the Minister. Section 316 permits the Minister to issue a Ministerial Certificate, which can be registered in the Federal Court and has the same force and effect as a judgment. Section 317 creates a scheme whereby the Minister may garnish the amounts payable from money owed to the debtor.

Income Tax Act, R.S.C. 1985 (5th Supp.) c. 1, s. 223, 224 and 227.

Section 223 allows the Minister to obtain and register a certificate in respect of amounts payable under the Act. Once registered, the certificate is deemed to be a judgment of the Federal Court against the debtor for a debt due to Her Majesty. Certificates may also be filed or otherwise recorded for the purpose of creating a charge on land.

Section 224 allows the Minister to order those about to make a payment to a tax debtor to make the payment instead to the Receiver General on account of the tax debtor's liability. Section 224 also captures payments owing to secured creditors which, but for the security interest, would be owing to the tax debtor.

Section 227 imposes a deemed trust in respect of amounts required to be withheld pursuant to regulations made under s. 153(1) of the Act. The Crown has a lien and charge over the property and assets of the person required to withhold amounts under s. 153(1). The Crown has been careful to draft s. 227 in such a way as to ensure that it has absolute priority in respect of claims concerning unremitted source deductions and GST.

Canada Pension Plan, R.S.C. 1985, c. C-8, as am. S.C. 1986, c. 6, s. 132, s. 23.

Section 23 of this Act creates a deemed statutory trust, similar to that created under the *Income Tax Act*. Thus, the Crown holds a deemed trust in respect of amounts required to be withheld under the *Canada Pension Plan*.

Employment Insurance Act, S.C. 1996, Ch. – 23, s. 126.

Section 86 also creates a deemed statutory trust such that the Crown holds a deemed trust over the assets of the debtor for any amount that the debtor fails to remit under the *Employment Insurance Act*.

Section 126 permits the Commission to certify an amount payable under Part I or II of the *Employment Insurance Act*, without delay, if the Commission believes that the person liable to pay the amount is attempting to avoid payment and in any other case, on the expiration of 30 days after the default. Furthermore, if the Commission has knowledge or suspects that a person is about to become indebted or liable to make a payment to a person liable to an amount payable under Part I or II of the *Employment Insurance Act*, the Commission may by a notice served personally or sent by a confirmed delivery service, require the first person to pay the money otherwise payable to the second person in whole or in part to the Receiver General on account of the second's person's liability.

Radiocommunication Act, R.S.C. 1985, c. R-2, s. 13.

Pursuant to s. 13(1), where an individual is convicted of certain specified offences related to radio communications, the radio apparatus in relation to which or by means of which the offence was committed may be forfeited to the Crown. Pursuant to this provision, the Crown is obligated to publish a notice of the forfeiture in the Canada Gazette (s. 13(2)). Once this notice is published, anyone who "claims an interest in the apparatus as owner, mortgagee, lien holder

or holder of any like interest" may make an application to any superior court of competent jurisdiction for an order declaring that his interest is not affected by the forfeiture and declaring the nature and extent of his interest and the priority of his interest in relation to other interests (s. 13(6)). In addition, the court may order that the apparatus to which the interests relate be delivered to one or more of the persons found to have an interest therein, or that an amount equal to the value of each of the interests so declared be paid to the persons found to have those interests (s. 13(6)).

Security for Debts Due to Her Majesty Regulations, SOR/87-505, s. 3, 4.

Section 3 provides that a Minister responsible for the recovery or collection of any debt or obligation due or payable to the Crown may accept a security (as defined in section 4) in respect of any such debt, obligation or claim. It also states that such a Minister may execute and deliver, on payment of any such debt, obligation or claim, any instrument that will effectively release or discharge any security accepted in respect of the debt, obligation or claim, or, on payment of a portion of any such debt, obligation or claim, any instrument that will effectively release or discharge any security accepted in respect of the portion of the debt, obligation or claim that has been paid.

Section 4 defines "security" as "a charge in favour of Her Majesty on the existing or future personal or real property of a debtor or on the existing personal or real property of a person who is the surety or guarantor of the debtor".

Telecommunications Act, 1993, c. 38, s. 74.1 (amendment not yet in force)

This section is identical to s. 13 of the *Radiocommunication Act*, except that it deals with telecommunications apparatus instead of radio communication apparatus.

APPENDIX H

Summary of legislative and regulatory provisions

relating to bankruptcy issues arising in the context of

federal security interests

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2, 14.06(7), 30(1), etc.

Section 14.06(7) gives the federal and provincial Crown a "super priority" against the debtor in a bankruptcy for costs of remedying any environmental condition or environmental damage affecting real property of the debtor. The Crown priority operates as a charge on the real property and ranks above any other claim, right or charge against the property.

Section 30(1) gives the Trustee in Bankruptcy broad powers to run the bankrupt's financial affairs. This power includes the right to give security on property of the bankrupt.

Section 47 gives the Court the power to appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which a s. 244 notice relates. Section 47 is designed to ensure that the debtor does not dissipate its assets during the 10 day freeze in which secured creditors are prevented from realizing on their security.

Section 67(2) provides that, notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Section 69 provides that upon the filing of a notice of intention or of a proposal unsecured creditors are stayed from taking enforcement measures against the debtor.

Section 87 provides that a statutory lien whose sole purpose is to secure a claim of the Crown

is only valid in relation to a bankruptcy if it is registered.

Section 244(1) provides that secured creditors intending to enforce a security on all or substantially all of the inventory, the accounts receivable or the other property of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, notice of that intention.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-35, s. 2 and 11.8(8)

Section 11.8(8) is similar to s. 14.06(7) of the *Bankruptcy and Insolvency Act*. It gives the federal and provincial Crown a charge against the real property of debtor companies for costs of remedying environmental damage affecting the real property of the debtor company. The Crown charge has priority over any other charges on the affected real property.

Winding-Up and Restructuring Act, R.S.C. 1985, c. W-11, s. 78-84

Sections 78-84 provide a process for dealing with secured claims where a business is being wound up. Section 78 provides that where a creditor holds security on the estate of a company, the creditor shall make a claim in which it specifies the nature and amount of the security. Pursuant to s. 79 the liquidator may then either consent to the retention of the security by the creditor or may require the creditor an assignment and delivery of the security. If the latter, the value of the security is to be paid by the liquidator out of the estate as soon as the liquidator has realized the security.

APPENDIX I

Summary of legislative and regulatory provisions

relating to pension and benefits issues arising in the context of

federal security interests

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 65(1)

Section 65(1) states that benefits may not be assigned and security interests in them cannot be given. It is further provided that any transaction purporting to assign or grant a security interest in a benefit is void.

Canadian Association of Former Parliamentarians Act, 1996, c. 13, s. 7(g)

Section 7(g) gives the Association power to create security interests in property given and bequeathed to it in order to secure any obligation of the Association.

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, s. 14 and 70

Section 14 provides that benefits under certain specific Parts of the Act are not capable of being assigned or given as security. It is also provided that benefits are exempt from seizure and execution.

Section 70 is identical to s. 14 except that it applies to benefits given under a different part of the Act.

Employment Insurance Act, 1996, c. 23, s.86

Section 42 states that, subject to subsections (2) and (3), benefits are not capable of being assigned, charged, attached, anticipated or given as security and any transaction appearing to do so is void.

Section 86 operates in the same way as s. 227 of the *Income Tax Act*. Section 86 creates a deemed trust in favour of the Crown in respect of amounts required to by paid by an employer under the Act. As with the *Income Tax Act* provisions, s. 86 is designed to give the Crown an absolute priority with respect to amounts deducted and not remitted.

Section 126 permits the Commission to certify an amount payable under Part I or II of the *Employment Insurance Act*, without delay, if the Commission believes that the person liable to pay the amount is attempting to avoid payment and in any other case, on the expiration of 30 days after the default. Furthermore, if the Commission has knowledge or suspects that a person is about to become indebted or liable to make a payment to a person liable to an amount payable under Part I or II of the *Employment Insurance Act*, the Commission may by a notice served personally or sent by a confirmed delivery service, require the first person to pay the money otherwise payable to the second person in whole or in part to the Receiver General on account of the second's person's liability.

Garnishment, Attachment and Pension Diversion Act, R.S.C. 1985, c. G-2, s. 3.

The purpose of this Act is to authorize the garnishment or attachment of the Crown and the diversion of pension benefits payable by the Crown under certain circumstances. Section 3 states that "notwithstanding any provision of any other Act of Parliament preventing the garnishment of Her Majesty, Her Majesty may be garnisheed, subject to and in accordance with this Part and any regulation made hereunder". The Act provides separate procedures to be followed for the garnishment of departments, Crown corporations, Canadian Forces and Parliament.

Labour Adjustment Benefits Act, R.S.C. 1985, c. L-1, s. 23

Section 23 provides that labour adjustment benefits are not capable of being assigned or given as security, and that any transaction purporting to assign or give security in a labour adjustment benefit is void.

Members of Parliament Retiring Allowances Act, R.S.C. 1985, c. M-5, s.60

Section 60 provides that allowances and benefits under the act are not capable of being assigned or given as security interests. It is also provided that such benefits are exempt from seizure and execution.

Old Age Security Act, R.S.C. 1985, c. O-9, s. 36(1)

Section 36 provides that benefits shall not be assigned or given as security and that benefits are exempt from seizure and execution.

Pension Benefits Division Act, 1992, c. 46, s. 12(1)

Section 12(1) provides that amounts that spouses or former spouses may be entitled to have transferred are not capable of being assigned or given as security. The section also states that such amounts are not subject to seizure or execution.

Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd Supp.), s. 36(2)

Section 36 makes void any agreement to assign or give as security any benefit provided under a pension plan or any money withdrawn from a pension fund.

Public Service Superannuation Act, R.S.C. 1985, c. P-36, s. 10(10) and 58

Section 10(10) is similar to many of the other statutory provisions listed in this section. It provides that benefits are not capable of being assigned or given as security and that benefits are exempt from seizure and execution.

Section 58 is identical to section 10(10) except that it pertains to benefits given under a different Part of the Act.

Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11, s. 9(7)

Section 9(7) stipulates that benefits under Parts II and III of the Act cannot be assigned or given as security and that such benefits are exempt from seizure and execution.

Special Retirement Arrangements Act, 1992, c. 46, s.22

Section 22 provides that a benefit under a special pension plan or retirement compensation arrangement is not capable of being assigned or given as security and that such benefits are exempt from seizure and execution.

APPENDIX J

Summary of miscellaneous legislative and regulatory provisions

Canada Business Corporations Act, s. 82-95, and 189(1).

Sections 82 to 95 outline the procedure that must be followed by a trustee under the terms of a trust indenture in the event of default (i.e. where a security interest constituted by the trust indenture becomes enforceable, or where the principal, interest and other moneys payable thereunder become or may be declared to be payable before maturity). Pursuant to section 85, for example, a holder of debt obligations issued under a trust indenture may require the trustee to furnish a list setting out the names and addresses of the registered holders of the outstanding debt obligations, the principal amount of outstanding debt obligations owned by each such holder, and the aggregate principal amount of debt obligations outstanding as shown on the records maintained by the trustee. Under section 86, an issuer or a guarantor of debt obligations issued or to be issued under a trust indenture must the trustee with evidence of compliance with certain conditions in the trust indenture. Section 90 also forces the trustee to give notice of every event of default arising under the trust indenture to the holders of debt obligations issued under a trust indenture within thirty days after the trustee becomes aware of the occurrence thereof.

Section 189(1)(d) states that unless the articles or by-laws of or a unanimous shareholder agreement relating to a corporation otherwise provide, the articles of a corporation are deemed to state that the directors of a corporation may, without authorization of the shareholders, "mortgage, hypothecate, pledge or otherwise create a security interest in all or any property of the corporation, owned or subsequently acquired, to secure any obligation of the corporation".

Canada Cooperative Associations Act, R.S.C. 1985, c. C-40, s. 91-93.

Section 90(1)(e) empowers the directors of a cooperative association to "secure any debentures or other securities, or any other present or future borrowing or liability of the association, by mortgage, charge or pledge of all or any currently owned or subsequently acquired real and personal property of the association, and the undertaking and rights of the association". Section 93 states that a cooperative association must deliver to the Minister the particulars of certain types of mortgages or charges created by the associations.

Canada Cooperatives Act, 1998, c. 1, s. 267-280.

Sections 267-280 are identical to sections 82-95 of the CBCA (described above).

Canada Corporations Act, R.S.C. 1970, c. C-32, s. 68.

Section 68 states that a corporation must deliver to the Minister the particulars of certain types of mortgages or charges created by the corporation.

Expropriation Act, R.S.C. 1985, c. E-21, s. 26(10) and 33.

Subsection 26(10) outlines the methodology for calculating the value of an expropriated interest subject to a security interest.

Section 33 outlines the procedure for calculating the compensation to which the holder of a security interest on an expropriated land is entitled.

APPENDIX K

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[1] We would like to acknowledge the invaluable assistance provided by Karen Shaver and Kevin Palframan, students-at-law, in researching and preparing this report.

[2] (1983) 48 C.B.R. (N.S.) 14 (Ont. S.C.).

[3] *Bankruptcy and Insolvency Rules* -- C.R.C., c. 368, s. 137.

[4] The courts of other provinces have also examined this issue and reached the same conclusion. See: *Federal Business Development Bank* v. *Workers' Compensation Board of Nova Scotia* (1984) 11 D.L.R. (4th) 395 (N.S.C.A.), *Federal Business Development Bank* v. *Alberta (Sheriff)* [1984] A.J. No. 226 (Alta. Q.B.), and *Federal Business Development Bank* v. *Hillcrest Motor Inn* (1986) 6 B.C.L.R. (2d) 223 (B.C.S.C.).

[5] *Canada Student Loans Act*, R.S.C. 1985, c. S-23, *Canada Student Loans Regulations*, SOR/93-392, *Canada Small Business Financing Act*, 1998, c. 36, and *Canada Small Business Financing Regulations*, SOR/99-141.

[6] Hardy, Anne E. "Court jurisdictional differences in bankruptcy discharges involving student loans or income tax liabilities" Nat. Cred. & Debt. R., December 1997, vol.12, no. 4, at p. 49.

[7] *Canada Student Loans Act*, R.S.C. 1985, c. S-23.

[8] *Canada Student Loans Regulations*, SOR/93-392. In such a case, sections 30-32 of the Regulations provides that the federal government is subrogated in and to all the rights of the lender in respect of the guaranteed student loan.

[9] *Ibid.* It should be noted that since the 1997 amendments to s. 178(1)(g) of the BIA, student loan debts or obligations are not released by an order of discharge in the circumstances outlined in the subsection. Conditional orders for discharge will only apply if the bankruptcy occurs after the time periods in the subsection have expired. Much has been written on the hardships resulting from these amendments.

[10] *Ibid.* The statistics discussed in this paragraph were compiled by Hardy, *supra* note

4. at p. 59.

[11] MacKinnon, Mark, "Big banks abandon student-loan program" *Globe and Mail*, March 8, 2000, at p. A1.

[12] *Ibid.*

[13] *Canada Small Business Financing Act*, 1998, c. 36.

[14] *Canada Small Business Financing Regulations*, SOR/99-141.

[15] McCarthy, Shawn, "Small-business loan claims cost feds $500-million" *Globe and Mail*, March 18, 2000, at p. B4.

[16] *Ibid.*

[17] *Ibid.*

[18] The precise wording of the forms need not be followed. With respect to a Notice of Intention, subsection 427(5) provides that the document may be of "like effect". For example, in *Royal Bank of Canada* v. *MacKenzie*, [1932] S.C.R. 524, the bank used a different form and the security was deemed to be valid since the document was of "like effect".

[19] Earlier versions of the Bank Act did not a Notice of Intention to be registered. As a result, the security was sometimes characterized as the bank's "secret lien". In the 1923 revision, a requirement was added that the borrower provide a Notice of Intention to give security which was to be registered according to the *Bank Act*. The details of the registration system for Notices of Intention are set out in the *Registration of Bank Special Security Regulations*, SOR/92-301.

[20] (1982), 134 D.L.R. (3d) 706 (Ont. H.C.).

[21] *Ibid.*, at p. 709.

[22] See for example: Wood, Roderick, "The Nature and Definition of Federal Security Interests" (1999) [unpublished]; Ziegel, Jacob S., "Harmonization of Section 427 of the Bank Act and Provincial Personal Property Security Acts: Is There a Better Solution?" (1997) 12 B.F.L.R. 425; De Corby, Roger V. and Donald H. Layh, "PPSA and Bank Act Priorities – Some Answers, Some Questions" (1996) 11 B.F.L.R. 95; Crawford, Bradley, "Interaction Between the PPSA and Section 178 of the Bank Act" (1993) 8 B.F.L.R. 1; Cuming, Ronald C.C. and Roderick J. Wood, "Compatibility of Federal and Provincial Personal Property Security Law" (1986) 65 Can. Bar Rev. 267; and Wood, Roderick J., *Federal Law and the New Provincial Personal Property Security Regime* (LL.M. Thesis, York University, 1982).

[23] It should be noted that many of the issues identified below are drawn from the Canadian Bar Association's November 1997 submission to the Minister of Finance entitled *Submission on Harmonization of Section 427 of the Bank Act and Provincial Personal Property Security Acts*. Some of these issues are also discussed in Tay, Derrick C., Ruper H. Chartrand, Barry I. Goldberg and Carol Hansell, *Position Paper on Revising Bank Act Security*, (January 1991) [unpublished].

[24] (1980), 29 O.R. (2d) 193 (C.A.).

[25] *Bank of Montreal* v. *Pulsar Ventures Inc.* (1987), 7 P.P.S.A.C. 258 (Sask. C.A.) and *Royal Bank* v. *Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569 (Sask. C.A.).

[26] *Bank of Montreal* v. *Trapa Forest Products Ltd., H.S.C. Developments Ltd., et al.*, unreported, Vancouver Registry, released January 8, 1988.

[27] *Birch Hills Credit Union Ltd.* v. *C.I.B.C.* (1988), 52 D.L.R. (4th) 113 (Sask. C.A.).

[28] Ziegel, Jacob S., "Harmonization of Section 427 of the Bank Act and Provincial Personal Property Security Acts: Is There a Better Solution?" (1997) 12 B.F.L.R. 425, at p. 429.

[29] *Ibid.*

[30] 1996, c. 10, s. 104-106.

[31] *Ibid.*, s. 104.

[32] 1995, c. 24 s. 12.

[33] Industry Canada, Corporation Directorate, Policy Statement 16.1, March 30, 1998, para. 5.02.

[34] *Ibid.* para. 5.04.

[35] CTA, s. 104(2) and 105(3).

[36] Policy Statement 16.1, *supra* note 32 at para. 5.04.

[37] *Constitution Act, 1867*, 1867 (U.K.) Chap. 3.

[38] (1976), 12 O.R. (2d) 103 (Ont. H. C. J.).

[39] R.S.C. 1970, c. R-2.

[40] R.S.O. 1970, c. 409.

[41] *Supra* note 37 at p. 5 (QL).

[42] R.S.O. 1990, Chap. R-20 and R.S.O. 1990, Chap. L-5, respectively.

[43] *Supra* note 37 at para 5.06.

[44] *Ibid.* at para 4.01.

[45] *Ibid.* at para 4.07.

[46] CTA s. 104(1) and (2) and s. 104(4).

[47] UNIDROIT Work Programme for the 1999-2001 triennium; taken from http:// www.unidroit.org/ english/workprogramme/main.htm.

[48] Mooney, Charles W. "Exporting UCC Article 9 to an International Convention: The Local Law Conundrum", (1996) 27 *Can. Bus. L. J.* 278 to 290.

[49] Michael A. Weinczok, *The Farm Debt Review Act*, 18 C.B.L.J. 43. Page 43.

[50] *Farm Debt Review Act*, R.S.C. 1985, Chap. 25 (2nd Supp.).

[51] *Farm Debt Mediation Act*, R.S.C. 1997, Chap. 21, s. 12(a) and (b).

[52] (1988), 70 Sask. R. 228 (C.A.).

[53] Weinczok, *supra*, note 48 at page 53.

[54] *Meridian Developments Inc. v. Toronto-Dominion Bank*, (1984), 11 D.L.R. (4th) 576.

[55] Weinczok, *supra*, note 48 at page 54.

[56] *Farm Debt Mediation Act Regulations*, SOR/98-168, s. 3.

[57] *Ibid.*, page 62.

[58] *Arran Savings & Credit Union Ltd. v. Melnyk* (1987), 42 D.L.R. (4th) 370, 64 Sask. R. 212 (Q.B.).

[59] Weinczok, *supra*, note 48, p. 65.

[60] *Agricultural Marketing Programs Act*, R.S.C. 1997, c. 20, s. 4.

[61] *Ibid.*, s. 2.

[62] R.S.C. 1985, c. C-49.

[63] Robert S. Fuller & Donald E. Buckingham, *Agricultural Law in Canada*, Butterworth's, Toronto, 1999. Page 90.

[64] R.S.C. 1993, c. 14.

[65] R.S.C. 1985, c. 25 (3rd Supp.).

[66] "Lender" is defined in s. 2 of the *FIMCLA* to include "a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*. Credit unions, caisse populaires and trust companies must be designated by the Minister as lenders for the purposes of the Act.

[67] Mercier Marc R. and Richard A. Haigh, "High-Tech Lending: Maintaining Priority in an Intangible World", 14 B.F.L.R. 45, p. 69 [hereinafter "Mercier and Haigh"].

[68] (1991), 35 C.P.R. (3d) 384 (Fed. T.D.).

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[70] Zimmerman, Colleen S., Lise Bertrand and Leslie Dunlop, "Intellectual Property in Secured Transactions", 8 C.I.P.R. 74, pp. 89-90 [hereinafter "Zimmerman et al."].

[71] *Ibid.*, p. 90.

[72] (1990), 34 C.P.R. (3d) 1.

[73] [1927] 3 D.L.R. 7 (Alta. C.A.).

[74] Mercier and Marin, *supra* note 68, p. 62.

[75] *Ibid.*, page 63.

[76] Zimmerman et al., *supra* note 69, p. 81.

[77] Mercier and Haigh, *supra* note 68, p. 60.

[78] Zimmerman et al., *supra* note 69, p. 97.

[79] 1991, Chap. 50, ss. 1 to 22.

[80] 1867 (U.K.).

[81] See M. Richard, "Real Property in the Federal Government: An Overview of the Law Governing Federal Real Property", in *Real Property in the Federal Government* (1997: Canadian Bar Association), p. 4.

[82] *Ibid.* at 17.

[83] *Ibid.*, p. 34.

[84] *Ibid.*

[85] *Ibid.*, p. 35.

[86] R.S.C. 1985, Chap. F-11.

[87] C.R.C., c. 675; as am. SOR/81-339, as am. SOR/82-726, as am. SOR/91-35, as am. SOR/93-259, as am. SOR/95-8. (hereinafter the *Regulations*).

[88] [1994] 2 S.C.R. 765 (S.C.C.).

[89] [1994] Q.J. No. 1102 (Que. Sup. Ct.).

[90] [1990] B.C.J. No. 2284 (B.C.S.C.).

[91] *Bank of Montreal v. Guarantee Co. of North America* [1991] B.C.J. No. 3264 (B.C.C.A.).

[92] [1996] B.C.J. No. 534 at 5 (QL) (B.C.S.C.); this passage was taken from a publication entitled *Builders Liens 1995 Related Actions*, by O'Connor C.J. and Miachika, D.L., (1995: CLE) and quoted by the Court of Appeal in this case.

[93] *Mitchell v. Peguis Indian Band* [1990] 5 W.W.R. 97 (S.C.C.) [hereinafter *Mitchell*].

[94] *Indian Lands Registration Manual, 1998 Indian Lands Registry*, Department of Indian and Northern Affairs, 1998, p. 4 [hereinafter the *Registration Manual*].

[95] "First Nations Resource Council Indian Law Bulletin 1/91 – Legal Aspects of Delivering Finance to Reserve Resident Business Ventures", from Reiter, R.I., *The Fundamental Principles of Indian Law, Vol. I & II*, (First Nations Resource Council: 1994) [hereinafter *Law Bulletin 1/91*].

[96] *Constitution Act*, 1867.

[97] *Constitution Act*, 1867, section 91(24).

[98] [1976] 1 S.C.R. 170 [Man.].

[99] s. 89(1) of the *Indian Act*.

[100] Reynolds, J. I. "Security for Financing " (1993) 8 B.F.L.R. 331 at p. 334.

[101] See the *Registration Manual*, *supra* note 93.

[102] Reynolds, *supra* note 99, p. 337.

[103] *Law Bulletin 1/91 supra* note 94.

[104] Reynolds, *supra* note 99, p. 338.

[105] *Webtech Controls v. Cross Lake Band of Indians*, [1991] 3 C.N.L.R. 182 (Man. Q.B.) stated that although the money was located in a bank account outside the reserve, the money in the account was received pursuant to an agreement with the federal Crown.

[106] "Personal Property (and off-reserve real estate)" from *Native Law*, Jack Woodward (Ed.), Rel. 1999 at p. 291 [hereinafter *Native Law*].

[107] *Maracle v. Ontario (Minister of Revenue)*, Ont. Gen. Div., Doc. No. Ottawa 7325/87, May 20, 1993 [unreported].

[108] *R. v. Lovitt*, [1912] A.C. 212 (P.C.) as referred to in *Alberta (Workers' Compensation Board) v. Enoch Band* (1993), 11 Alta. L.R. (3d) 305 (C.A.).

[109] (1989), 57 D.L.R. (4th) 647 (B.C.C.A.).

[110] *Supra* note 92.

[111] *Mitchell* as quoted in *Native Law*, *supra* note 105 at p. 292.

[112] (1991), 2 P.P.S.A.C. (2d) 151 (N.B.C.A.).

[113] *Native Law supra* note 105 at p. 296.

[114] In *R. v. Bernard* (1991), 118 N.B.R. (2d) 361 the Court held that under s. 89(2) of the *Indian Act* property sold to a native where the right of possession remains in the seller is available for seizure by the seller.

[115] *Native Law supra* note 105 at p. 290.

[116] Reynolds *supra* note 99 at p. 342.

[117] *Ibid.*

[118] See *Native Law supra* note 105 at p. 295.

[119] *Ibid.*

[120] *Kostyshyn (Johnson) v. West Region Tribal Council Inc.* (1992), 55 F.T.R. 48 (F.T.D.).

[121] [1992] 1 S.C.R. 877.

[122] *Dykstra v. Monture* [1999] O.J. No. 5284 (Ont. S.C.J.).

[123] *Native Law supra* note 105 at p. 298.1.

[124] *Ibid.*

[125] Jill Wherritt, Parliamentary Research Branch, Legislative Summary of Bill C-49, October 22, 1998.

[126] *Native Law supra* note 105 at 297.

[127] Reynolds *supra* note 99 at 343.

[128] *Law Bulletin 1/91 supra* note 94 at 6.

[129] S.C. 1999, Ch. 24 [hereinafter the *FNLMA*].

[130] *FNLMA*, s. 15.

[131] *FNLMA*, s. 18(2).

[132] *Native Law* supra note 105 at p. 298.3.

[133] G. Christie, "Aboriginal Rights, Aboriginal Culture and Protection" (1998) Osgoode Hall L. J. 447 at p. 476.

[134] Wood, R.J. & Wylie, M.I., "Non-consensual security interests in personal property", (1992) *Alta. L. Rev.* (No. 4) 1055.

[135] R.S.C. 1985, c. E-15, ss. 314 and 317.

[136] *Ibid.* s. 314.

[137] R.S.C. 1985 (5th Supp.) c. 1, ss. 223, 224 and 227.

[138] *Income Tax Regulations*, C.R.C., c. 945., ss. 2200-2201.

[139] R.S.C. 1985, c. C-8, as am. S.C. 1986, c. 6, s. 132.

[140] S.C. 1996, Ch. 23.

[141] SOR/87-505, ss. 3 and 4.

[142] *Radiocommunication Act*, R.S.C. 1985, c. R-2 and *Telecommunications Act*, 1993, c. 38. It should be noted that s. 74.1 has not yet been enacted into force.

[143] Section 426.37 of the *Criminal Code*, R.S.C. 1985, c. C-46 also provides that the court

> shall order any property that is proceeds of crime to be forfeited to Her Majesty.

[144] Other federal acts create unique environmental super-priority charges. For example,

section 14.06(7) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and section 11.8(8) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 create non-consensual charges for the Crown's environmental remediation costs in a restructuring receivership or bankruptcy proceedings.

[145] Wood, R.J. "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank v. Sparrow Electric Corp.*" (1995) 10 B.F.L.R. 429 at p. 430.

[146] Wood & Wylie, *supra* note 133 at 8 (QL).

[147] *Royal Bank of Canada v. Sparrow Electric Corp.* (1997), 143 D.L.R. (4th) 385 at

399 (S.C.C.) (hereinafter *Sparrow*).

[148] *Income Tax Act*, s. 227(5), as am. S.C. 1986, c. 6, s. 118(1).

[149] *Sparrow*, *supra* note 148.

[150] *Sparrow*, *supra* note 148 at 429.

[151] *Ibid.*, p. 386.

[152] *Sparrow*, *supra* note 148.

[153] Belzil, François H. "Update on Crown Priorities", *Commercial Times*, No. 392.

[154] *Income Tax Act*, s. 227(4).

[155] *Re San Diego Catering*, [1995] B.C.J. No. 654 (B.C.S.C.).

[156] [1999] B.C.J. No. 670, on appeal to the B.C.C.A. (hereinafter *Tuxedo*).

[157] *Tuxedo*, at p. 7 (QL).

[158] *Ibid.*

[159] Belzil, *supra* note 154.

[160] [1999] S.J. No. 738 (Sask. Ct. Q.B.) hereinafter *First Vancouver Finance*.

[161] *Ibid.*, p. 5 (QL).

[162] Belzil, *supra* note 154. As previously discussed, Parliament's Bill C-24, currently at

second reading stage, would harmonize the ITA and *Excise Tax Act* provisions in relation

to deemed statutory trusts.

[163] *Ibid.*, p. 2.

[164] *Ibid.*, p. 2.

[165] *Ibid.*, p. 2.

[166] [1996] 1 S.C.R. 963 (S.C.C.).

[167] *Supra* note 161.

[168] *Supra* note 157, at p. 3.

[169] *Ibid.*

[170] *Ibid.*

[171] *Tuxedo*, *supra* note 157, *Board of Industrial Relations v. Avco Financial Services Realty Ltd.* [1979] 2 S.C.R. 699 (hereinafter *Avco*).

[172] *Avco*, *supra* note 172.

[173] Wood & Wylie, *supra* note 133.

[174] *Ibid.* at 24 (QL).

[175] Houlden, Lloyd W. and Geoffrey B. Morawetz, *The 1999 Annotated Bankruptcy and Insolvency Act*, Carswell, Scarborough, Ontario, 1999 at p. 488.

[176] The Law Society of Upper Canada, 39th Bar Admission Course, Phase Three, Fall 1997, Business Law - Chapter 14, *Secured Creditors' Rghts and Remedies*, at p. 5.

[177] *Commercial Tenancies Act*, R.S.O. 1990, Ch. L. 7, s. 31(2).

[178] *Ibid.*, at p. 6.

[179] *Ibid.*, at p. 7.

[180] *Ibid.*, at p. 22.

[181] *Ibid.*, at p. 23.

[182] *Re Josephine V. Wilson Family Trust and Swartz* (1993), 23 C.B.R. (3d) 88, 16 O.R. (3d) 268, 107 D.L.R. (4th) 160 (Gen. Div.).

[183] *Customs Act*, R.S.C. 1985 (2nd Supp.), c. 1.

[184] *Resource Plastics Inc. v. W. Pickett & Bros. Customs Brokers Inc.* (1995), 36 C.B.R. (3d) 231 (Ont. Gen. Div.).

[185] Simpson, Jeffrey J., *Crown Possessory Liens under the Bankruptcy and Insolvency Act*, 12 Comm. Insol. R. (1999), at p. 2.

[186] *Ibid.*, at p. 6.

[187] See preamble to the *Pension Benefits Standards Act*.

[188] The reader should be aware that each of the provinces has legislated its own pension act. For example, the *Pension Benefits Act (Ontario)* R.S.O. 1990, Chap. P. 8, governs "every pension plan that is provided for persons employed in Ontario". Thus, the federal and provincial legislation work together to govern pensions.

[189] R.S.C. 1985, c. G-2, s. 3.

[190] Sections 31 to 40.1 of the *Garnishment Act*.

[191] The *Pension Benefits Division Act* R.S.C. 1992, Ch. 46, s. 107 (brought into force September 30, 1994) permits spouses or former spouses (by presenting either a court order, or separation agreement) to apply to the Minister for a division of a spouse's pension entitlement. Under section 8, the Minister is authorized to effect the division by any one of the following: (a) transferring an amount equivalent to fifty per cent of the pension value to the spouse or former spouse; (b) transferring the amount to a pension plan registered under the *Income Tax Act (Canada)*; (c) transferring the amount to a retirement savings plan fund; or (d) transferring the money to a financial institution authorized to sell life annuities. Section 8 also authorizes the Minister to adjust the pension plan benefits that have accrued to the pension plan member. Finally, section 12 exempts the amounts that a spouse or former spouse may become entitled to, under section 8, from attachment, seizure and execution, either at law or equity.

[192] Pask, E. Diane & Cheryl A. Hass, "Division of Pensions: The Impact of Family Law on Pensions and Pension Plan Administrators" (1993) 9 C.F.L.Q. 133.

[193] *Wiebe v. Wiebe*, [1988] S.J. No. 766 [hereinafter "*Wiebe*"].

[194] 13 R.F.L. (3d), at p. 11.

[195] *Wiebe*, *supra* note 188.

[196] *Re Beattie and Ladouceur (Attorney General of Canada, Intervenor)*, (1995) 23 O.R. (3d) 225.

[197] *H. (S.) v. L. (R.D.)* (1996) 13 C.C.P.B. 8 (B.C.S.C.).

[198] (1998) 19 C.C.P.B. 67 (Alberta).

[199] (1994) 27 C.B.R. (3d) 238 (Ont. Ct. Just.). In a recent decision, however, the Saskatchewan Court of Queen's Bench failed to follow the analysis presented in *Re Burton* and found that Canada Pension Plan payments were not property for the purpose of bankruptcy (*Re Bird* [2000] S.J. No. 21.

[200] [1993] M.J. No. 110 (M.C.Q.B.).

[201] (1998), 39 O.R. (3d) 176 (Ont. C.A.), aff'g *Abraham v. Coopers & Lybrand Ltd.* (1993), 13 O.R. (3d) 649 (Ont. Gen. Div.); leave to appeal to the Supreme Court of Canada ref'd November 5, 1998. [1998] S.C.C.A. No. 276.

[202] *Ibid.* at 698.

[203] *Ibid.*

[204] *Ibid.* at 188.

[205] [1997] O.J. No. 39 (Q.L.) at 6.

[206] *Canada Pension Plan*, R.S.C. 1985, Chap. C-8, s. 65(1), (1.1); *Old Age Security Act*, R.S.C. 1985, c. O-9, s. 36(1).

[207] *Re Municipality of Metropolitan Toronto and O'Brien; Canadian Imperial Bank of Commerce, Garnishee* (1995) 23 O.R. (3d) 543 (Ont. Ct. Gen. Div.).

[208] *Norman A. Mintzer v. Her Majesty the Queen*, (1995) 96 D.T.C. 5131 (F.C.A.).

[209] *Ibid.*

[210] R.S.C. 1985, Chap. C-44.

[211] R.S.C. 1998, Chap. 1.

[212] R.S.C. 1970, Chap C-32.

[213] R.S.C. 1985, Chap. E-21.

[214] See Roderick J. Wood, "The Nature and Definition of Federal Security Interests" as referred to in footnote 21.

[215] Ibid.

[216] Supra note 21.